

No. 14852

United States
Court of Appeals
for the Ninth Circuit

C. A. SWANSON & SONS POULTRY COM-
PANY,

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for
the Manuel Delatorre dba R & M Egg Farms,
Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

NORMAN A. OBRAND,
408 S. Spring St.,
Los Angeles 13, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,
THOMAS A. TOBIN,
FRANK WELLER,
817-111 W. 7th St.,
Los Angeles 14, Calif.



In the District Court of the United States for the
Southern District of California, Central Division
No. 17388-BH

WILLIAM A. WYLIE, Trustee in Bankruptcy for
MANUEL DELATORRE, dba R & M EGG
FARMS, Bankrupt,

Plaintiff,

vs.

C. A. SWANSON & SONS POULTRY CO., a
Corporation; DOE ONE, DOE TWO, DOE
THREE, DOE FOUR, DOE FIVE, DOE
SIX, DOE SEVEN, DOE EIGHT and DOE
NINE,

Defendants.

COMPLAINT TO RECOVER VOIDABLE
PREFERENCE UNDER THE PROVI-
SIONS OF BANKRUPTCY ACT SECTION
60b

Plaintiff Complains of Defendants, and Each of
Them, and for Cause of Action Alleges as
Follows:

I.

That the true names or capacities, either individ-
ual, corporate, associate, or otherwise, of defendants
Doe One, Doe Two, Doe Three, Doe Four, Doe Five,
Doe Six, Doe Seven, Doe Eight and Doe Nine are
unknown to the Plaintiff herein, who, therefore
sues said defendants by such fictitious names, and
will ask leave to amend his complaint to show their
true names and capacities when said name has been

ascertained. Each of the said defendants so sued have, or claims to have, some interest in or to the within matter. [2*]

II.

That the bankruptcy proceedings of Manuel Delatorre, dba R & M Egg Farms, were commenced by the filing of an involuntary petition in bankruptcy on August 20, 1953, in the United States District Court for the Southern District of California, Central Division; that the said Manuel Delatorre was adjudicated a bankrupt on the said involuntary petition on September 9, 1953.

III.

That William A. Wylie, the Plaintiff herein, was on December 14, 1953, at a First Meeting of Creditors, appointed trustee in the bankruptcy estate of Manuel Delatorre, and immediately thereupon qualified and has at all times thereafter, and does now, act as trustee in the said bankruptcy proceedings.

IV.

That on May 29, 1953, and within four months of the commencement of the within bankruptcy proceedings, the bankrupt, Manuel Delatorre, was indebted to the defendants, and each of them, in the sum of \$16,830.78 for merchandise previously sold and delivered to the bankrupt on open account.

V.

That beginning on June 5, 1953, the bankrupt made seven payments to the defendants, and each

of them herein, to a total sum of \$12,267.05; that all of the said payments, and each of them, were made within four months of the commencement of the within bankruptcy proceedings.

VI.

That on May 29, 1953, and at all times thereafter, the bankrupt, Manuel Delatorre, was insolvent.

VII.

That on May 29, 1953, and at all times thereafter, defendants, and each of them herein, had reasonable cause to believe that the bankrupt, Manuel Delatorre, was insolvent. [3]

VIII.

That the effect of the said delivery and payment will be to enable the defendants, and each of them, to obtain a greater percentage of their debts owing from the bankrupt than other creditors of the same class.

Wherefore, Plaintiff demands judgment against the defendants, and each of them, for the sum of \$12,267.05, together with interests and costs.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for William A.
Wylie, Trustee, Plaintiff.

Duly verified.

[Endorsed]: Filed October 26, 1954. [4]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant C. A. Swanson & Sons, a Nebraska corporation, sued herein as C. A. Swanson & Sons Poultry Co., a corporation, and, answering the complaint on file herein, admits, denies and alleges as follows, to wit:

I.

Answering Paragraph IV of the said complaint, this defendant admits that on May 29, 1953, the bankrupt, Manuel Delatorre, was indebted to the said defendant for merchandise previously sold and delivered to the bankrupt on open account, but denies that said amount was \$16,830.78, and denies generally and specifically each and every other allegation in said Paragraph.

II.

That between the 5th day of June, 1953, and the 20th day of July, 1953, the date of the last item on the account between said bankrupt and this defendant, the bankrupt made seven payments to the defendant totalling the sum of \$8,689.70; denies generally and specifically each and every other allegation [6] contained in Paragraph V of the said complaint.

III.

Denies generally and specifically each and every allegation contained in Paragraph VI of the said complaint.

IV.

Denies generally and specifically each and every allegation contained in Paragraph VII of the said complaint; and in this connection alleges, on the contrary, that on May 29, 1953, and thereafter until sometime in July of 1953, this defendant believed, and had good cause to believe, that the bankrupt, Manuel Delatorre, was solvent, and did thereafter extend further credit to said bankrupt.

V.

Denies generally and specifically each and every allegation contained in Paragraph VIII of the said complaint.

As a Second and Affirmative Defense, this defendant alleges:

I.

That on or about the 12th day of June, 1953, said bankrupt was indebted to this defendant in the sum of \$10,931.13, and sought further credit from said defendant; that in order to induce this defendant to extend further credit said bankrupt executed on said date a chattel mortgage covering certain fixtures and equipment; that, relying upon said chattel mortgage, this defendant did on or about the 30th day of June, 1953, extend further credit to said bankrupt and delivered to him additional merchandise of the value of \$1395.90; that had this defendant known that said bankrupt was then insolvent, or that the chattel mortgage constituted a prefer-

ence, said defendant would not have delivered said merchandise to said bankrupt.

Wherefore, this defendant prays that plaintiff take nothing by his complaint; that this defendant may go hence with its costs; and for such other and further relief as to the Court may seem meet and just in the premises.

/s/ NORMAN A. OBRAND,
Attorney for Said Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 12, 1954. [7]

[Title of District Court and Cause.]

STATEMENT OF ISSUES

Comes now William A. Wylie, Trustee and Plaintiff, and C. A. Swanson & Sons Poultry Co., a corporation, Defendant, and represents that the issues of fact to be tried in the above-entitled action to be as follows:

I.

How much was the indebtedness owing from the bankrupt, Manuel Delatorre (hereinafter "Delatorre") to the Defendant, C. A. Swanson & Sons Poultry Co., a corporation (hereinafter "Swanson"), on May 29, 1953?

II.

What was the total amount of the payments made

by Delatorre beginning June 5, 1953, to and including August 20, 1953, to Defendant Swanson? [9]

III.

Was Plaintiff Delatorre insolvent at all times from and after May 29, 1953?

IV.

Did Defendant Swanson from and after May 29, 1953, and at all times have reasonable cause to believe in the insolvency of Delatorre, if the said Delatorre was in fact insolvent?

V.

Did the payments made to Defendant Swanson from and after May 29, 1953, up to the date of bankruptcy on August 20, 1953, enable the said Defendant Swanson to receive a greater percentage of payment on its claims than was received by other creditors of the same class?

VI.

Was merchandise delivered on credit by the Defendant Swanson to Delatorre after May 29, 1953?

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for William A.
Wylie, Plaintiff.

/s/ NORMAN A. OBRAND,
Attorney for C. A. Swanson
& Sons Poultry Co.

[Endorsed]: Filed January 3, 1955. [20]

[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFF AND REPLIES

The defendant C. A. Swanson & Sons, a corporation, hereby replies to plaintiff's interrogatories, as follows:

Interrogatory No. 1:

What was the nature of the merchandise delivered on June 30, 1953, in the sum of \$1,395.90 as alleged in the second affirmative defense of the defendant herein? State the exact amounts of all materials delivered on that date.

Reply:

There was no merchandise delivered on said date. The item in question was the recharging to the account of an uncollected check. Counsel in error believed that this charge was for merchandise, and the answer was so prepared.

Interrogatory No. 2:

How was the merchandise delivered on June 30, 1953, in the sum of \$1,395.90 as alleged in the second affirmative defense delivered to the bankrupt?

Reply:

No merchandise was delivered. [27]

Interrogatory No. 3:

If the merchandise delivered June 30, 1953, was delivered by a representative of the defendant, C. A.

Swanson & Sons, what was the name of the truck driver who made the delivery?

Reply:

No merchandise was delivered.

Interrogatory No. 4:

What were the credit terms on which the merchandise delivered June 30, 1953, was delivered to the bankrupt?

Reply:

No merchandise was delivered.

Dated: January 19, 1955.

/s/ NORMAN A. OBRAND,

Attorney for Said Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 20, 1955. [28]

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS
AND REPLY

Defendant C. A. Swanson & Sons, a corporation, herewith replies to plaintiff's request for admissions, as follows:

1. That on June 5, 1953, a payment was received by the defendants here, C. A. Swanson & Sons, in the sum of \$2,542.91.

/ Answer: Admitted.

2. That on June 10, 1953, a payment was received by the defendants, C. A. Swanson & Sons, in the sum of \$1,632.00.

Answer: No such payment received on June 10, 1953, but it is admitted that a payment in said amount was received by this defendant May 29, 1953.

3. That on June 22, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$1,963.84.

Answer: No such payment has been received by this defendant.

4. That on July 6, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$1,000.00.

Answer: Admitted.

5. That on July 13, 1953, a payment was received by the defendant here, [30] C. A. Swanson & Sons, in the sum of \$500.00.

Answer: Admitted.

6. That on July 14, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$1395.90.

Answer: Admitted.

7. That on July 20, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$3232.40.

Answer: Admitted.

Dated: January 20, 1955.

/s/ NORMAN A. OBRAND,
Attorney for Said Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1955. [31]

[Title of District Court and Cause.]

MEMORANDUM OPINION

It is ordered that the plaintiff is entitled to judgment as prayed for.

The assertions of plaintiff that this judgment will result in an injustice because the time for filing claims has expired can be overcome by defendant complying with and in accordance with the provisions of Section 57(n) of the Bankruptcy Act, thus enabling the defendant to share the assets of the bankruptcy estate with other creditors rather than permit it to retain the benefit of its preference.

Plaintiff is directed to submit proposed judgment and findings within ten days.

Dated: This 16 day of March, 1955.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed March 16, 1955. [34]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing on the "Complaint to Recover Voidable Preference under the Provisions of the Bankruptcy Act; Section 60b," on the 2nd day of February, 1955, at the hour of 10:00 a.m. thereof; and the Plaintiff, William A. Wylie, Trustee, having appeared in person and had been represented by his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell, and the Defendant, C. A. Swanson & Sons Poultry Co., having appeared by and through its counsel, Norman Obrand; and evidence both oral and documentary having been offered and received; and the court being fully advised in the premises, does now make the following Findings of Fact, Conclusions of Law based thereon: [36]

Findings of Fact

I.

The court finds as true that the bankruptcy proceedings of Manuel Delatorre, dba R & M Egg Farms, were commenced by the filing of an involuntary petition in bankruptcy on August 20, 1953, in the United States District Court for the Southern District of California, Central Division, and that the said Manuel Delatorre was adjudged a bankrupt on the said involuntary petition on September 9, 1953.

II.

The court finds as true that William A. Wylie, the Plaintiff herein, was, on December 14, 1953, at a First Meeting of Creditors, elected trustee in the bankruptcy estate of Manuel Delatorre, and immediately thereupon qualified, and that he has at all times thereafter up to and including the date of the trial of this action acted as trustee in the said bankruptcy proceedings.

III.

The court finds as true that on May 29, 1953, and within four months of the commencement of the within bankruptcy proceedings, the bankrupt, Manuel Delatorre, was indebted to the Defendant, C. A. Swanson & Sons Poultry Co., in the sum of \$16,830.78 for merchandise previously sold and delivered to the bankrupt on open account.

IV.

The court finds as true that beginning on June 5, 1953, the bankrupt made seven payments to the Defendant, C. A. Swanson & Sons Poultry Co., a corporation, to a total sum of \$12,267.05, and that all of the said payments, and each of them, were made within four months of the commencement of the bankruptcy proceedings against Manuel Delatorre.

V.

The court finds as true that on May 29, 1953, and at all [37] times thereafter the bankrupt, Manuel Delatorre, was insolvent.

VI.

The court finds as true that on May 29, 1953, and at all times thereafter, the Defendant, C. A. Swanson & Sons Poultry Co., had reasonable cause to believe that the bankrupt, Manuel Delatorre, was insolvent, and the court further finds as true that specifically on June 5, 1953; June 10, 1953; June 22, 1953; July 6, 1953; July 13, 1953; July 14, 1953, and July 20, 1953, the same being the dates of payments totaling \$12,267.05, and on each of the said days the Defendant, C. A. Swanson & Sons Poultry Co., had reasonable cause to believe that the bankrupt, Manuel Delatorre, was insolvent.

VII.

The court finds as true that the effect of the deliveries and payments, on the aforesaid dates to a total of \$12,267.05, is to enable the Defendant, C. A. Swanson & Sons Poultry Co., to obtain a greater percentage of payment on its debt owing from the bankrupt than has been made, or will be made to other creditors of the same class.

Conclusions of Law

I.

That the payments on June 5, 1953; June 10, 1953; June 22, 1953; July 6, 1953; July 13, 1953; July 14, 1953, and July 20, 1953, totaling \$12,267.05, to the Defendant, C. A. Swanson & Sons Poultry Co., by the bankrupt, Manuel Delatorre, constituted a preference under the provisions of Section 60a of the Bankruptcy Act.

II.

That the preference paid to the Defendant, C. A. Swanson & Sons Poultry Co., as set forth in Conclusion I before, is a voidable preference under the provisions of Section 60b of the [38] Bankruptcy Act.

Dated: March 25, 1955.

/s/ BEN HARRISON,
U. S. District Court Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 25, 1955. [39]

In the District Court of the United States for the
Southern District of California, Central Division

No. 17,388-BH

WILLIAM A. WYLIE, Trustee in Bankruptcy
for MANUEL DELATORRE, dba R & M
EGG FARMS, Bankrupt,

Plaintiff,

vs.

C. A. SWANSON & SONS POULTRY CO., a
Corporation, et al.,

Defendants.

JUDGMENT

This matter having come on for hearing on the
"Complaint to Recover Voidable Preference under

the Provisions of the Bankruptcy Act, Section 60b," on the 2nd day of February, 1955, at the hour of 10:00 a.m. thereof; and the Plaintiff, William A. Wylie, Trustee, having appeared in person and had been represented by his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell, and the Defendant, C. A. Swanson & Sons Poultry Co., having appeared by and through its counsel, Norman Obrand; and evidence both oral and documentary having been offered and received; and it appearing that the court has made and filed its Findings of Fact and Conclusions of Law in this matter; and the court being otherwise fully advised in the premises,

Now, Therefore,

It Is Ordered that the Plaintiff is entitled to judgment [42] in the sum of \$12,267.05 against the Defendant, C. A. Swanson & Sons Poultry Co., a corporation, together with interest thereon and its costs; and

It Is Further Ordered, Adjudged and Decreed that the Defendant, C. A. Swanson & Sons Poultry Co., shall be entitled to file its claim against the bankrupt estate of Manuel Delatorre, dba R & M Egg Farms, No. 57,809-WM, in the United States District Court for the Southern District of California, Central Division, provided the said Defendant shall pay all sums due under this judgment within 30 days from and after the date of the final judgment herein.

Dated: March 25, 1955.

/s/ BEN HARRISON,
U. S. District Court Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 25, 1955.

Docketed and entered March 25, 1955. [43]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff and to Craig, Weller & Laugharn,
Esqs., His Attorneys:

Please Take Notice that the defendant C. A. Swanson & Sons, a corporation, intends to and will move the above-entitled Court, in the department thereof presided over by the Hon. Ben Harrison, Judge, to vacate and set aside the decision and judgment in the above-entitled action, and to grant a new trial.

Said motion will be based upon this notice, upon all of the files, papers, pleadings and proceedings herein, upon the minutes of the Court, and will be made upon the following grounds:

1. Insufficiency of the evidence to justify the decision and judgment in that (a) the plaintiff failed to prove affirmatively that this defendant either knew, or had reasonable cause to believe, that the bankrupt was insolvent at the time the alleged preference was made, while on the other hand defendant

introduced positive testimony, uncontradicted, that it was led to believe by representations of the bankrupt, by reports of credit agencies, and by a cursory [45] glance at the bankrupt's books that the bankrupt was solvent; (b) plaintiff has failed to meet the burden of proof that this defendant knew, or had reasonable cause to believe, that the payments made to it by the bankrupt would result in a preference within the meaning of the Bankruptcy Act.

2. That the said decision and judgment is against the law, for the same reasons as are set forth in the preceding paragraph.

Dated: This 31st day of March, 1955.

/s/ NORMAN A. OBRAND,
Attorney for Said Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 1, 1955. [46]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 11, 1955

Present: Hon. Ben Harrison, District Judge.

Counsel for Plaintiff: Frank Weller present at morning session, C. E. H. McDonnell present at afternoon session.

Counsel for Moving Defendant: No appearance at morning session, Norman A. Obrand present at afternoon session.

Proceedings:

For hearing motion of def't C. A. Swanson & Sons, a corp., for new trial, filed April 1, 1955, pursuant to notice by the clerk April 4, 1955.

There being no appearance at the morning session for defendant, Court Orders motion for new trial denied.

At 2 p.m. Court Orders that the order denying motion for new trial is vacated. Attorney Obrand argues in support of motion of said defendant for new trial.

Court Orders said motion for new trial denied.

EDMUND L. SMITH,
Clerk;

By MURRAY E. WIRE,
Deputy Clerk. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
COURT OF APPEALS

To the Hon. Ben Harrison, Judge of the said District Court, and to Craig, Weller & Laugharn, Esqs., Attorneys for Plaintiff Herein:

Notice is hereby given that C. A. Swanson & Sons, a corporation, defendant sued herein as C. A. Swanson & Sons Poultry Co., a corporation, hereby appeals to the United States Court of Appeals for

the Ninth Circuit from the final judgment entered in this action on March 25, 1955.

Dated: This 9th day of May, 1955.

/s/ NORMAN A. OBRAND,
Attorney for Said Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1955. [53]

In the United States District Court, Southern
District of California, Central Division
No. 17,388-BH Civil

WILLIAM A. WYLIE, Trustee in Bankruptcy
for MANUEL DELATORRE, dba R & M
EGG FARMS, Bankrupt,
Plaintiff,

vs.

C. A. SWANSON & SONS POULTRY CO., a
Corporation, et al.,
Defendants.

Honorable Ben Harrison, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

CRAIG, WELLER & LAUGHARN, by
C. E. H. McDONNELL, ESQ.

For Answering Defendant Swanson:

NORMAN A. OBRAND, ESQ.

February 2, 1955, 10:00 A.M.

The Court: You may proceed.

The Clerk: William A. Wylie, Trustee in Bankruptcy, vs. C. A. Swanson & Sons.

Mr. Obrand: We are ready, your Honor.

Mr. McDonnell: The plaintiff is ready.

The Court: You may proceed.

Mr. McDonnell: If it please the court, I think that a brief statement concerning the issues in the matter may be of some assistance.

You will recall that when counsel for the defendant and I were here at the time of the pretrial we filed a statement of issues. Since that time, through the medium of further discovery procedure, I believe the issues presented in that original statement have been produced.

For example, one issue presented in the statement of issues, No. 6, was that merchandise question. Was merchandise delivered on credit by the defendant Swanson to Delatorre after May 29, 1953?

An interrogatory filed by the plaintiff herein elicited a response indicating that this allegation in the complaint was in error; that as a matter of fact that represented a bookkeeping transaction on the books of the defendant and there actually had been no merchandise delivered, so that that [2*] issue is not presented in this matter.

The first two issues concerning the amounts of payment after May 29, 1953, to the date of bank-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ruptcy, that issue has been narrowed—those two issues, one and two, have been narrowed somewhat.

Demand for admissions filed here by the plaintiff have elicited a response indicating that with the exception of payments, I believe on June 10th and June 22nd, that is payments alleged in the complaint, are admitted so that we have narrowed the issue as to payment to just those two dates and——

The Court: What payments are in issue then?

Mr McDonnell: The payments which the plaintiff alleged were received by C. A. Swanson & Sons on June 10, 1953, in the amount of \$1,632 and the payment received, alleged to have been received on June 22nd, 1953, in the amount of \$1,963.84.

The other payments alleged in the complaint are admitted.

I would like to begin by calling Mr. Harold Harris.

The Court: I was wondering if the defendant desires to make any statement as to what he expects to prove.

Mr. Obrand: Yes, your Honor.

As counsel has stated, your Honor, the issues are very narrowed here. The only question is as to whether under the law there was a preference.

The defendant will attempt to show that although payments were received within the four-month period that there was no [3] knowledge on the part of the defendants of any insolvency or even any apparent insolvency on the part of the bankrupt.

They accepted the payments in good faith and in the ordinary course of business and there is one

payment which is alleged in the interrogatory which we cannot find unless it is made up of several smaller payments which we haven't been able to identify.

I think our case is very simple, if the court please. We admit that certain payments were made but we had no knowledge of any insolvency and they were accepted in good faith.

The Court: Are these the only two payments in issue?

Mr. McDonnell: Yes, I believe that is correct.

Mr. Obrand: The first payment that is mentioned, your Honor, we acknowledge having received it on a different date but we acknowledge having received it.

Mr. McDonnell: I am in a quandary in the reply to request for admissions filed here by the defendant through its attorney.

Item No. 1 says that they admit on June 5, 1953, a payment was received by this defendant in the sum \$2,542.91.

Do I understand that that admission is not correct, Mr. Obrand?

Mr. Obrand: We acknowledge having received a payment such as is mentioned in interrogatory No. 1 but on a different [4] date than specified in your interrogatory.

Mr. McDonnell: Then you do not admit you received it on June 5?

Mr. Obrand: Correct.

The Court: Is the payment of June 10 and 22nd admitted?

Mr. McDonnell: Those are the two which are denied, your Honor. They deny that they received a payment on June 10th and they deny that they received a payment on June 22nd.

I am rather taken back after the formal admission filed in this matter that they received it.

Mr. Obrand: I am sorry, I had my interrogatories mixed up. No. 1 is admitted and No. 2 is the one——

The Court: What is No. 1?

Mr. Obrand: On June 5 a payment was received in the sum of \$2,542.19.

Mr. McDonnell: That is admitted?

Mr. Obrand: Yes. I am sorry I got the numbers wrong.

Mr. McDonnell: Nos. 2 and 3.

Mr. Obrand: What I meant was of the two which are in question, the second one, that is No. 2 on June 10th, it is alleged that a payment of \$1,632 was received by the defendants. We deny that such a payment was received on June 10th but on May 29 we received such a payment.

Mr. McDonnell: If the court please, that will be a subject of legal argument on the question of when payment is [5] made. In other words, the problem, legal problem being presented, is payment made when the check is received or is payment made when the check clears the bank.

Of course the plaintiff takes the position and did in their complaint and does now, that payment is made under California law when the check is honored at the bank or otherwise paid.

The Court: How about this item of June 2nd?

Mr. Obrand: June 22nd. We have no record of any such payment whatsoever.

Mr. McDonnell: That will be a subject of proof, your Honor.

The Court: Then so I can thoroughly understand this, wasn't there some claim that there was a transfer of a chattel mortgage or something?

Mr. McDonnell: That will be a portion of the proof in the plaintiff's case as to the mortgage of chattels.

The mortgage of chattels has been invalidated previously in the bankruptcy court for failure to comply with the notice required by the California law.

The Court: Then that is not an issue here.

Mr. Obrand: No claim was even filed in the bankruptcy court under that.

Mr. McDonnell: That is correct. I think that generally speaking if I can outline the issues which I believe will be [6] presented it will clarify the atmosphere.

These are the issues. First of all was a payment made on June 10th? Secondly was a payment made on June 22? Then the general issue: Was there an insolvent condition after May 26 and finally of course——

The Court: The date of bankruptcy was when?

Mr. McDonnell: The date of bankruptcy was August 20 I believe, your Honor, 1953.

The Court: Are these the only two items this suit is over?

Mr. McDonnell: Well the suit is over some seven payments only two of which are denied.

The Court: What are the other payments that are admitted?

Mr. McDonnell: There was a payment on June 5, 1953, of \$2542.91.

The Court: Yes.

Mr. McDonnell: There was a payment admitted on July 6, 1953, of \$1000.

There was a payment admitted on July 13, 1953, of \$600.

There is a payment admitted on July 14, 1953, of \$1,395.90.

There is a payment admitted on July 20, 1953, of \$3,231.40.

The total of those payments is \$8,671.21.

The complaint is for \$12,267.05 and the difference between the two figures is the two payments which are not admitted, respectively, of \$1,632. [7]

The Court: How much were the two payments?

Mr. McDonnell: \$3,595.84 is in dispute as to payments. The defendant, of course, taking the position that none of the payments were preferential.

The Court: May I make inquiry as to whether there has been any effort to adjust this matter.

Mr. McDonnell: We have received no offer of settlement at all, your Honor.

Mr. Obrand: There have been no discussions in that connection, your Honor.

The Court: These are hardship cases, and that is the reason I asked the question.

Mr. McDonnell: We are aware of that, your Honor. Shall I proceed?

The Court: You may proceed.

Mr. McDonnell: Mr. Harris, will you take the stand?

HAROLD HARRIS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harold Harris.

Direct Examination

By Mr. McDonnell:

Q. Mr. Harris, by whom are you presently employed? A. William A. Wylie. [8]

Q. Is he the trustee in bankruptcy in the case of Manuel Delatorre, doing business as R & M Egg Farms? A. Yes, sir.

Q. What generally are your duties for Mr. Wylie? A. I am Mr. Wylie's agent.

Q. In connection with the Manuel Delatorre bankruptcy were you designated by Mr. Wylie to pick up the books? A. Yes, sir.

Q. And did you pick up the books?

A. Yes, sir.

Q. From whom?

A. From Mr. Delatorre's store and from Mr. Delatorre's attorney.

Q. Do you have those books which you picked up in court? A. Yes, sir.

Q. Are they the books which are over here on the press table? A. Yes, sir.

(Testimony of Harold Harris.)

Q. Have those books been out of the hands of Mr. Wylie to your knowledge since you picked them up? A. No.

Mr. McDonnell: I have no further questions.

Mr. Obrand: No questions.

Mr. McDonnell: You may be excused, Mr. Harris. Call Mr. Mulherin. [9]

THOMAS MULHERIN

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Thomas M. Mulherin.

Direct Examination

By Mr. McDonnell:

Q. Mr. Mulherin, what is your business or occupation?

A. I am a certified public accountant.

Q. Have you had experience in investigating matters, Mr. Mulherin? A. Yes, I have.

Q. What was that experience?

A. I was with the FBI.

The Court: I might say the court is familiar with this witness' experience and background.

Mr. McDonnell: Would the court take judicial notice of his background?

The Court: Unless counsel wants to go into it.

Mr. Obrand: I will stipulate to that. It is just a question of fact here.

(Testimony of Thomas Mulherin.)

Q. (By Mr. McDonnell): Mr. Mulherin, were you employed by Mr. William A. Wylie, trustee in bankruptcy, for the bankrupt in this matter to do some accounting work in this matter? [10]

A. Yes, sir.

Q. What was the general nature of the accounting work you were to perform?

A. To examine Mr. Wylie's records—Mr. Wylie's records which were formerly Mr. Delatorre's and to examine the records of others in an attempt to determine, No. 1, whether there appeared to be any concealment of assets in this case and, No. 2, whether or not there appeared to be any preferential payments to creditors.

Q. Did you inspect the books in Mr. Wylie's hands? A. I did; yes, sir.

Q. Mr. Harris identified the books over here on the press table as those in Mr. Wylie's hand. Before court commenced did you inspect those books?

A. Yes, sir, I did.

Q. Are those the ones you inspected and used in your accounting? A. Yes, sir.

Q. Did you also inspect the books of the defendant C. A. Swanson & Sons?

A. Yes. I examined the books of C. A. Swanson through Mr. Elliott who made them available to me.

Q. When you inspected the books of Mr. Wylie which had been formerly Mr. Delatorre's, did you attempt to analyze whether or not there was a condition of insolvency or solvency? [11]

A. Yes, I did.

(Testimony of Thomas Mulherin.)

Q. Did you specifically attempt to ascertain the condition as of November 26, 1952?

A. I did, yes, sir.

Q. Did you find an insolvent condition on the books as of that time?

A. I found that the liabilities were greater than the assets by \$1,722.12 according to the books?

Q. Now, you said you examined the books of C. A. Swanson & Sons? A. Yes, sir.

Q. Which were made available to you by the defendant? A. Yes, sir.

Q. Did you in that—in the course of that examination have occasion to inspect a payment or payments sometime around June 10, 1953?

A. If I may I would like to lay the background. There is, basically, of course, no difference in our accounting. I think we agree as to the amount due at the end. The only difference is this. In the statement I prepared for you I attempted to show when a check was returned by the bank and then indicate the actual date of payment until I had some documentary evidence which showed the date of payment rather than the date which was entered on Mr. Swanson's books which, generally speaking, was the date the check was received by Mr. [12] Delatorre. That is the only difference with respect to any of these items.

Q. Well now, let us take the case of the June 10 item. Do your work sheets show when the check was received?

A. The June 10th item—that is \$1,632. It was

(Testimony of Thomas Mulherin.)

originally received as check 2763 on the Bank of America by C. A. Swanson & Sons.

Mr. Obrand: Just a moment, if your Honor please. I think at this time if the witness is to testify from a work sheet that a proper foundation should be laid for the work sheet, I don't know whether it was prepared at the time he made the examination of the Swanson books or whether it was afterwards made up, information he obtained from the bank books.

The Court: Did you make up the work sheet from the books of the company?

The Witness: My basic work sheets were made at the time I examined the records of Swanson, the accounts receivable ledger. It is made up from the basic documents. And starting with that I asked Mr. Elliott to obtain for me and he did the invoices showing the goods that were sold.

There was one item after examining the invoices of 19—excuse me, of \$1,635. When I examined the invoices it was the R & S Egg Company instead of R & M.

I brought that to Mr. Elliott's attention and he said [13] it was obviously an error on the C. A. Swanson books which they would correct and they did.

Now, after that was eliminated there was no difference in our accounting except that I asked Mr. Elliott also for the notes from the bank when these checks were returned and using those and using the records of Mr. Delatorre as to checks, I established

(Testimony of Thomas Mulherin.)

these dates of June 10 and June 22nd of which we are speaking, rather than May 29. They are all within the four-month period.

Q. (By Mr. McDonnell): Do I understand your testimony to be that the item of \$1,632 was originally a check on May 29?

A. That is correct, yes, sir.

Q. And what happened to that check? Can you tell us from your inspection of the records?

A. Yes.

The Court: When you are talking about May, that is 1953?

Mr. McDonnell: Yes, it is all in 1953.

The Witness: All these payments, whether we take Mr. Swanson's records, Delatorre's records or bank records are all within the four-month period. It is just a question of days.

On June 3rd the check was returned, according to the notations made by the bank which Swanson received a copy of and then on June 10 a new check, check No. 46 drawn on the Torrance bank, was given in lieu of that check for \$1,632 [14] and cleared the bank.

Q. On the 10th of June? A. Yes, sir.

Q. Now, as with respect to the item of \$1,963.84, which the trustee has alleged was paid C. A. Swanson & Sons on May 22nd, can you give us the history of that transaction?

A. Yes. That consists of two items. May 29 receipt of \$1,945.35 as reflected by the accounts receivable ledger of Swanson & Sons and an item

(Testimony of Thomas Mulherin.)

of June 12 for \$1,849 also shown by the Swanson records.

We show the check, the \$1,945.35 item was returned by the bank on June 3rd, 1953, and on June 22nd they obtained a cashier's check in lieu thereof on the Torrance bank and that added to the \$1,849 makes up the amount you mentioned.

Q. From the Swanson books or from the Delatorre books could you tell what the \$1,849 item was, whether a check or cash or what?

A. That item does not appear on Delatorre's books. My notation respecting it was gathered from Swanson's books and it is shown among cash receipt records as being \$1,849 and I so show it on my sheet.

Q. Does it appear as an item of cash received?

A. I found no check in Swanson's records to indicate it was a check issued or, I should say, in Delatorre's. I found no check in Delatorre's records. [15]

Q. You have given each check to the payments of the 10th and 22nd of June, 1953?

A. Yes, sir.

Q. On the basis of when they were received from the notations that you have?

A. To the best of my ability going through basic documents, those are the dates.

Mr. McDonnell: That is all the questions I have of this witness.

Mr. Obrand: No questions, your Honor.

Mr. McDonnell: I should like to call Mr. Creal.

RAYMOND CREAL

called as a witness by the plaintiff, being first sworn,
was examined and testified as follows:

Direct Examination

By Mr. McDonnell:

Q. Mr. Creal, what is your business or occupation? A. Public accountant.

Q. And were you a public accountant during the years 1952 and 1953? A. Yes.

Q. And did you function as a public accountant for Mr. Manuel Delatorre and Mr. Bone, his partner, up until Mr. Bone's death?

A. Yes, I did. [16]

Q. In your capacity as public accountant did you have from time to time the duty of taking a statement off of the books of R & M Egg Farms?

A. Yes, I did.

Q. Did you take one off as of the 29th of March, 1953? A. Yes.

Q. Do you have your work papers with you that were the basis of the statement that you took off?

A. I have some.

Q. Do you have those papers which will show what that statement was?

A. Yes. I have a balance sheet and a profit and loss statement of March 29.

Q. Was March 29 the date of death of Mr. Bone, the other partner? A. Yes.

Q. What does the balance sheet that you pre-

(Testimony of Raymond Creal.)

pared as of March 29 show with respect to total assets at that time? A. \$25,420.37.

The Court: What was the date of the death of the partner?

Mr. McDonnell: March 29.

Q. (By Mr. McDonnell): And this was prepared sometime after that?

A. Shortly subsequent to his death, yes.

Q. Within a matter of a few weeks? [17]

A. Yes.

Q. Now, what does your balance sheet show as to the liabilities of R & M Egg Farms on March 29, 1953?

A. \$35,600. I don't have the total but it is some \$35,600, there being a deficit at that time of \$15,291.

Q. You mean that is the amount that the liabilities exceeded assets on March 29, 1953, of this business?

A. Yes, and I am reading from the balance sheet.

Q. Which you prepared? A. Yes.

Q. Now, did you use the books of Mr. Delatorre in preparing that balance sheet?

A. Yes, I did.

Q. Generally what books did you use, do you recall?

A. There are the receipts and disbursement journals, accounts receivable and accounts payable; ledgers, subsidiary ledgers.

(Testimony of Raymond Creal.)

Q. You used the ledgers and the journals generally? A. Yes.

Mr. McDonnell: I have no further questions of Mr. Creal.

Cross-Examination

By Mr. Obrand:

Q. Mr. Creal, did you at any time, about March 29, 1953, prepare any statement for the purpose of giving it to credit bureaus? [18]

A. Not particularly, no.

Q. Was any such request made of you by either Mr. Delatorre or Mr. Bone? A. No.

Q. Was any of the information which you acquired for the purpose of preparing the statement to which you just testified, given to C. A. Swanson & Sons? A. Well—

Q. To your knowledge?

A. To my knowledge, no.

Q. And to your knowledge was any information given to C. A. Swanson & Sons about the financial condition of the company?

A. I am not exactly sure whether information which appeared on the balance sheet here was submitted to them or not.

I had several accountants in my office and I allowed them to have copies of the financial statements and so forth that I had prepared at the time of Mr. Bone's death. We wanted a partnership accounting at that time.

Q. And you say at the time of his death there was an excess of liabilities over assets?

(Testimony of Raymond Creal.)

A. Yes.

Q. Of approximately \$10,000? A. Yes.

Mr. Obrand: No further questions. [19]

Redirect Examination

By Mr. McDonnell:

Q. Mr. Creal, did you continue as the accountant for Mr. Delatorre after the 29th of March, 1953?

A. Yes.

Q. To your knowledge did his business improve after March 29 or deteriorate?

A. It did not improve.

Q. Would you say it went along at about the same level? A. Yes.

Mr. McDonnell: No further questions.

The Court: How did they settle the partnership differences, do you know?

The Witness: No, sir, I don't know. I can only believe——

The Court: I don't care what you believe. You don't know?

The Witness: No, I haven't any facts.

The Court: What happened when Mr. Bone died? Was there any settlement made with his estate or anything?

Mr. McDonnell: I don't believe there was, your Honor. As you can see the business, according to Mr. Creal's testimony, was insolvent and I believe it was just continued as an individual proprietorship by Mr. Delatorre.

(Testimony of Raymond Creal.)

Are there any further questions of this witness?

The Court: No further questions. [20]

Mr. Obrand: No further questions.

Mr. McDonnell: May this witness be excused?

The Court: Yes, so far as the court is concerned.

Mr. McDonnell: I should like to call Mr. Delatorre, please.

MANUEL DELATORRE

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Manuel Delatorre.

Direct Examination

By Mr. McDonnell:

Q. Mr. Delatorre, are you the bankrupt in the case Manuel Delatorre, doing business as the R & M Egg Farms? A. That is right.

Q. You had been in partnership with Mr. Bone originally in this business, hadn't you?

A. Yes, sir.

Q. How long had you and Mr. Bone been operating the R & M Egg Farms?

A. About two years.

Q. Two years before it was put into bankruptcy?

A. Two years before it was put into bankruptcy, yes.

(Testimony of Manuel Delatorre.)

Q. That would be sometime in 1950 or '51 when you started the business? [21]

A. Around 1950.

Q. Now, from whom did you buy your eggs, Mr. Delatorre?

A. Well, our main supplier was the C. A. Swanson.

Q. That is C. A. Swanson & Sons Poultry Company? A. That is right.

Q. Had you done business with them ever since you started? A. Well, mostly.

Q. What percentage of your eggs would you say you had been buying from them in 1951 and 1952? A. I would say about 60 per cent.

Q. They were your major suppliers?

A. That is right.

Q. What had been your credit terms during the early months of 1953, Mr. Delatorre, with Swanson & Sons? A. 30 days.

Q. You mean you paid them 30 days after the eggs were purchased? A. That is right.

Q. Was there any change in that arrangement with C. A. Swanson & Sons?

A. Well, around May 1st they started cutting down my credit quite a bit. In fact they cut it down to about 10 days.

Q. They reduced the time in which you had to pay from [22] 30 days to 10 days, is that correct?

A. That is right.

Q. Who notified you of that reduction?

A. Mr. Elmo called me down to his office there

(Testimony of Manuel Delatorre.)

and he told me that things didn't look so good, so that he was going to cut my credit down.

Q. Now, you say Mr. Elmo called you down to his office. Is that the C. A. Swanson & Sons office?

A. That is right.

Q. Was he connected with them to your knowledge?

A. Well, he was one of the head men at that time.

Q. And he said that things weren't so good so he was going to cut your credit down to 10 days?

A. That is right.

Q. Then what happened after that—after the 1st of May?

A. Things went along until about the 1st of June. They come down to my place, Mr. Elmo and Mr. Elliott.

Q. And what happened when they came to your place of business?

A. They took inventory of everything I had and they demanded a chattel mortgage on my fixtures, trucks and everything else.

Q. Did they say anything about the status of your account with them at that time? [23]

A. They did go through my books.

Q. Who is it that went through your books?

A. Elmo and Mr. Elliott.

Q. And did you make all your books available to them so they could inspect them at that time?

A. I did.

Q. Now, you said something about a chattel

(Testimony of Manuel Delatorre.)

mortgage a few moments ago. Was it at that time that they asked for a chattel mortgage?

A. Well, they took inventory at the time they were over there and then a few days later I went back to C. A. Swanson and signed the chattel mortgage.

Q. Did they tell you you had to sign it when they were there?

A. Well, I imagine they did.

Q. I am going to show you a photostat—I might say for the court's benefit that counsel and I have inspected this document ahead of time and have agreed it is a photostat of the chattel mortgage. Counsel aren't able to find the original.

I am going to show you a photostat of a document called "Mortgage of Chattels" and I want you to look at the signature on the reverse side and see if you recognize that.

Mr. Obrand: We will stipulate that that is a photostatic copy and a true and correct photostatic copy of the original [24] as received by C. A. Swanson & Sons.

Mr. McDonnell: Then I shall offer it as Trustee's Exhibit first in order.

The Court: Received.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit 1 and received in evidence.)



Mortgage of Chattels

THIS MORTGAGE, made this 12th day of June, 19 53
by Jose M. Dela Torre dba R & M Farms 1221 So. Hawthorne Blvd.
Hawthorne, California

County of Los Angeles, State of California, Mortgagor,
To C. A. Swanson & Sons

337 South Anderson Street, Los Angeles 33, California

County of Los Angeles, State of California, Mortgagee,

WITNESSETH: That the said mortgagor mortgages to the said mortgagee all that certain personal property situated at 1221 South Hawthorne Boulevard, Hawthorne, California in the County of Los Angeles State of California, and described as follows, to-wit:

- 1 - 12' Hussmann Single Price Showcase #170614
- 1 - Dayton Scale - Style #6563 - Serial #1138127
- 1 - American Slicer - Model 52 - Serial #544572
- 1 - 12' Open Top Ward Monterey Refrigerated Display Case
- 1 - 5 Door - 4 Shelf Reach-in Refrigerated Box
- 1 - Liquid Carbonic Corp. Freezer
- 1 - 24" Sanitary Scale - Ser. #5522
- 1 - National Cash Register - Serial #3365306
- 1 - Victor Hand Adding Machine
- 1 - Paymaster Checkwriter - Model Y - Ser. #210272
- 1 - Weillink Fire Insulated Safe - Ser #IX-42509
- 9 - Candling Machines - B-B Lights
- 1 - 1948 Chevrolet Truck - Ser #BED 745452
- 1 - 1946 Ford Truck - Serial #2B51FB

as security for the payment to the said mortgagee of the sum of Twelve thousand three hundred twenty seven and 03/100 Dollars (\$12,327.03), on the 12th day of June, 19 53, with interest thereon at the rate of 6 per cent per annum,

in accordance with the terms of a promissory note of even date herewith, executed and delivered by the said mortgagor to the mortgagee; and also as security for the discharge and performance of all obligations and promises by said mortgage herein contained.

\$ 12,327.03 June 12, 19 53
On demand after date, for value received, I

promise to pay to C. A. Swanson & Sons

or order at 337 South Anderson Street, Los Angeles, California the sum of Twelve thousand three hundred twenty-seven and 03/100 Dollars

with interest at the rate of Six per cent per Annun from date, until paid, interest payable Quarterly, and if not so paid to be compounded

and bear the same rate of interest as the principal; and should the interest not be paid - then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in lawful money of the United States.

Jose M. Dela Torre

twenty seven and 03/100

Said mortgagor promises to pay said sum of Twelve thousand three hundred and Dollars (\$ 12,327.03), with interest thereon at the time and in the manner specified in said promissory note; and also that he will, during the continuance hereof, keep the mortgaged property in good condition and repair; and further that he will not remove, nor permit to be removed, any part of said property from the above premises without the written consent of the mortgagee first had and obtained; and further that he will, during the continuance hereof, keep the mortgagee property insured against loss by fire in some company which shall be satisfactory to the mortgagee, in an amount not less than

Dollars (\$) loss, if any, payable to the mortgagee, as his interest may appear.

The said mortgagor hereby declares and warrants to the mortgagee that he is the absolute and sole owner, and is in possession, of all said mortgaged property, and that the same is free and clear of all liens, encumbrances and adverse claims.

It is further agreed that, if said mortgagor shall fail to make payment of any part of the principal or interest as provided in said promissory note at the time and in the manner therein specified, or if any breach be made of any obligation or promise of the said mortgagor herein contained or secured hereby, then the whole principal sum unpaid on said promissory note, with interest accrued thereon, shall immediately become due and payable, at the option of the mortgagee; and the said mortgagee may at once proceed to foreclose this mortgage according to law; or the said mortgagee may, at his option, and he is hereby empowered so to do, enter upon the premises where the said mortgaged property may be and take possession thereof, and remove, sell and dispose of the same, and from the proceeds of sale retain all costs and charges incurred by him in the taking or sale of said property, including any reasonable attorney's fees thereby incurred; also, he may take all sums due him on said promissory note under any provision hereof including attorney's fees not exceeding per cent upon the amount due, and any surplus of such proceeds remaining shall be paid to the mortgagor.



It is further agreed that upon any sale of the mortgaged property according to law, or under the power herein given, that the said mortgagee may bid on the said sale, or make a purchase of the said mortgaged property, or any part thereof.

WITNESS my hand this 13 day of June, 1953

Jose Manuel De La Torre

STATE OF CALIFORNIA,

ss.

County of Los Angeles

ON THIS 13 day of June, A.D., 1953, before me,

a Notary Public in and for said County and State, personally appeared

Jose Manuel De La Torre, known to me,
R. M. Farris

to be the person whose name subscribed to the within Instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

H. K. Livingston
Notary Public in and for said County and State.

My Commission Expires April 19, 1957

No.

Mortgage
CHattel

.....
Jose M. De La Torre

To

.....
C. A. Swanson & Sons

DATED 13, 1953

DOCUMENT No. 2160

RECORDED AT REQUEST OF
C. A. Swanson & Sons

JUN 15 1953

55 MIN 10 A.M.

BOOK 11972 PAGE 69
OFFICIAL RECORDS

County of Los Angeles, California

FEE \$ 2.40

WAME B. BEATTY, County Recorder

By F. Brand Deputy

ORDER No.

When recorded, please mail this
Instrument to
REQUEST OF

C. A. Swanson & Sons

211 So. Main St.

L.H. 25

246/1127



(Testimony of Manuel Delatorre.)

The Court: That is not involved in this.

Mr. Obrand: No.

Mr. McDonnell: That is being offered on the question of the issue as to whether or not there was reasonable cause to believe—not over the issue as to validity or invalidity.

Mr. Obrand: And that is why we are not objecting.

Q. (By Mr. McDonnell): You are familiar with the chattel mortgage in evidence. Did it cover all your assets? A. Everything.

Q. Did it include your personal automobile?

A. No.

Q. But it got all the other assets of your business, is that correct?

A. Everything but my canned goods.

Q. Now, that is the canned goods in your retail store? A. That is right.

Q. Mr. Delatorre, did you ever give the C. A. Swanson & Sons any checks which bounced—that is, wouldn't clear the [25] bank?

A. Quite a few.

Q. Had you given them to them in the month of May, 1953? A. That is right.

Q. After the chattel mortgage was given did they accept any more of your checks?

A. I don't think so. I mean I had to give them certified checks.

Q. They wouldn't accept your checks?

A. That is right.

(Testimony of Manuel Delatorre.)

Q. Did you give them any cash or any customers' checks?

A. It is too far back to remember. I think I did.

Q. But all this took place after June 1st—after they came out to your place of business and went through your books? A. That is right.

Mr. McDonnell: I have no further questions at this time.

The Court: What kind of business were you running?

The Witness: Egg, wholesale and retail.

The Court: Where?

The Witness: In Hawthorne.

The Court: After you gave them this chattel mortgage did they continue to furnish you with merchandise—eggs?

The Witness: No.

The Court: These checks that you gave them after that were for money that you owed them before that time? [26]

The Witness: That is right. You see I had to go out and buy eggs from other people.

The Court: They cut off your credit when they took your chattel mortgage?

The Witness: That is right.

Cross-Examination

By Mr. Obrand:

Q. Mr. Delatorre, were you buying eggs from anyone else after June 1st?

A. Yes. I was forced to go out and buy eggs

(Testimony of Manuel Delatorre.)

from other brokers in order to keep my business alive.

Q. And you were attempting to keep your business alive weren't you? A. That is right.

Q. And you so told C. A. Swanson & Sons you have to buy eggs elsewhere to keep your business alive, did you not?

A. No, sir. They advised me to go out and buy eggs from other people so I could pay them.

Q. Now, did you know you were insolvent—withdraw that.

Did you know that you owed more than you could pay on June 1st, 1953?

A. That is right, I did.

Q. Did you tell C. A. Swanson & Sons that?

A. No, I didn't. [27]

Q. As a matter of fact weren't you advised by several credit agencies to get some credit information as to your assets and liabilities at about that time? A. I was.

Q. On June 1st when this chattel mortgage was given did you tell anyone that you owed more money than you had in the way of assets?

A. No, I don't think I did.

The Court: You didn't advertise it, did you?

The Witness: No, sir.

Q. (By Mr. Obrand): As a matter of fact you tried to keep your business going? You felt you could pull out of it, did you not?

A. Well, I was just taking a chance.

Q. Did C. A. Swanson & Company tell you they

(Testimony of Manuel Delatorre.)

would not sell you any more eggs after June 1st?

A. No. They didn't actually say that but—I mean they told me that any eggs that I bought I had to pay them cash for.

Q. Well, would you say for sure that you did not give them an ordinary check after June 1st—that is one that was not certified?

A. It is pretty hard to remember. I made out so many checks at that time that I couldn't actually remember.

Q. It is possible that you gave them some checks after [28] June 1st that were not certified, is it not?

A. I probably did.

Q. Now, when you mentioned having given them a chattel mortgage about June 1st to include everything, you didn't mean everything you had in the business, did you?

A. It was practically everything I had.

Q. Did it include your stock on hand?

A. No.

Mr. McDonnell: To which I object.

The Witness: You can't give——

Mr. McDonnell: I object to that because it would be illegal to give a stock in trade in a chattel mortgage.

Mr. Obrand: That is beside the point. The question is whether he did it.

The Court: Doesn't the document speak for itself? What did he own that wasn't covered?

Mr. Obrand: That is what I am trying to bring out here, your Honor, what else he had.

(Testimony of Manuel Delatorre.)

The Court: Then why don't you ask him that?

Mr. Obrand: Then I will have to refer to the chattel mortgage. May I use my copy, counsel?

The Court: Yes.

Q. (By Mr. Obrand): On this chattel mortgage, dated June 12, there is included only certain items of fixtures and equipment. [29]

A. That is right.

Q. Is there not? A. Yes.

Q. But you had other assets beside those mentioned in the chattel mortgage?

A. Not outside of just stock and my automobile.

Q. Did you have accounts receivable?

A. That is right, I had accounts receivable.

Q. About how much did you have in accounts receivable at that time?

A. I don't remember.

Q. Did you have any other assets beside the accounts receivable and the stock and your automobile? A. No, sir.

Q. Any real property?

A. Well, just my house which I was paying for.

Q. Well, did you tell the Swanson people that you had other assets besides those?

A. No, sir.

The Court: For my information may I ask were the checks given here and that are in dispute, were those payments on the chattel mortgage?

Mr. Obrand: Is the court asking me that question?

(Testimony of Manuel Delatorre.)

The Court: Yes, I am asking counsel on both sides.

Mr. Obrand: I don't believe so, your [30] Honor.

The Court: There was a chattel mortgage——

Mr. Obrand: If the court wishes me to make a statement with respect to the chattel mortgage I would like to do so.

The Court: I am trying to determine whether the chattel mortgage was taken for a certain amount and there were other obligations still owing or was it taken for all obligations?

Mr. Obrand: The chattel mortgage was taken merely as a form of security, or so the Swanson people thought. Actually it was held as a whip over Mr. Delatorre's head and for no other reason.

Payments as they were received, were not credited and we will be so prepared to prove they were not credited against any chattel mortgage.

It wasn't even prepared in a legal way—that is legal with respect to the laws of California, but merely as a whip over his head to make sure he made payments.

The Court: Then the chattel mortgage is for a specified amount?

Mr. Obrand: Yes, I believe it is.

The Court: What I am trying to ascertain is, was the chattel mortgage for a pre-existing debt?

Mr. Obrand: Yes, sir. It mentioned \$12,327 as of a certain date. Actually, your Honor, we will—we are offering to show and we will attempt to

(Testimony of Manuel Delatorre.)

show later that the fixtures and equipment which are the subject of the chattel mortgage here, [31] were only valued at \$1,000 which gives the court an idea of the purpose of the chattel mortgage.

The Court: What I am trying to find out is this. You have a list of checks that amount to almost \$12,000 within the four-month period. Now, was this chattel mortgage taken for a pre-existing debt or for future obligations?

Mr. Obrand: For a pre-existing debt, sir. In other words they said you owe us this much money and at this time we don't like they way things are going. We would like to have some measure of security that you are going to pay us. So they said, "We want you to sign a chattel mortgage," and he signed one.

The Court: So, so far as the chattel mortgage is concerned it is out of this case. It has been set aside by the bankruptcy court.

Mr. Obrand: Your Honor; I don't know that it has actually been set aside. I know they have not filed a claim for it.

Mr. McDonnell: It has been set aside.

The Court: But doesn't a chattel mortgage in effect cover the same items that are represented by these checks? Just a moment——

Mr. McDonnell: Perhaps I can help the court a little bit.

Mr. Mulherin's accounting indicates that on the date of the chattel mortgage, that is the actual date of the signing, [32] there was about \$12,655 owing

(Testimony of Manuel Delatorre.)

which matches fairly closely with the amount of the chattel mortgage.

The Court: The chattel mortgage is for \$12,327 and these checks amount to \$12,266.

Mr. Obrand: There is no connection between those two items, your Honor, to the best of my knowledge.

Mr. McDonnell: I think there is none. I don't believe payments were ever applied against the chattel mortgage.

The Court: What I am trying to find out is this. I think counsel can answer the question.

Swanson apparently assumed that the credit risk was poor and they took a chattel mortgage for an amount that was virtually the same amount as was owed.

Mr. Obrand: Well, I think the court is assuming a little more than I said. What I did say was this, your Honor, that——

The Court: There is no use in holding a whip over his head. He already owed them over \$12,000 and they weren't giving him any more credit.

Mr. Obrand: But they felt with the knowledge of his owing a chattel mortgage he couldn't dispose of his equipment or at least he would so feel, and that he might be inclined to pay his bills quicker.

The Court: You may proceed.

Q. (By Mr. Obrand): I believe you stated on direct examination, Mr. Delatorre, that your checks did not bounce [33] until about April. Was that correct? A. No, around March.

(Testimony of Manuel Delatorre.)

Q. Well, isn't it true that you had checks that bounced before March? A. (No answer.)

The Court: Did they bounce during the lifetime of Mr. Bone?

The Witness: Not—I would say one or two checks probably did.

Q. (By Mr. Obrand): Wouldn't you say that it was true that it was nothing unusual for a check to bounce in your business?

A. No. There was one time I told them to hold two checks but they put them in ahead of time and that caused a lot of my checks to bounce.

Q. Who did you tell that to? A. Elmo.

Q. And when your checks bounced afterward it was no different than what happened in the early part of 1953, is that correct?

A. Have you my records there. My records show. My ledger will show that to any broker that I was doing business with, two months previous to the bankrupt court, my credit was open with any broker.

Q. Didn't you testify in another courtroom last year [34] that checks were bouncing for other people beside Swanson?

Mr. McDonnell: Just a minute. I will object to that question as assuming a fact not in evidence. The testimony in other courts can be determined by transcripts. Transcripts can be obtained and presented and used as a basis of examination but to assume in another courtroom at another time he said something——

(Testimony of Manuel Delatorre.)

Mr. Obrand: I have to ask the question first before I can impeach the witness.

The Court: May I ask what materiality that has?

Mr. Obrand: To show that it was nothing unusual for checks to bounce and that it did not indicate insolvency and in and of itself the mere fact checks bounced—because there had been a pattern of checks bouncing in the past——

Mr. McDonnell: That is assuming the very fact I am contending he is assuming—a fact not in evidence.

Mr. Obrand assumes the checks had bounced in the past and that is a matter of proof.

Mr. Obrand: I am asking him if he ever made such a statement.

The Court: I will admit the evidence. I don't think it means too much one way or the other.

Q. (By Mr. Obrand): Did you testify that checks given to other concerns had bounced in the early part of 1953?

A. I don't remember. [35]

The Court: Checks made payable to Swanson were not the only checks that bounced, were they?

The Witness: Not in the early part of 1953, your Honor. I mean as soon as Swanson cut off my credit I went to Willardson & Co. and Harris Produce and Great West which I used to do once in a while. I used to buy eggs from them. My credit was completely 100 per cent with them. I know my accounts

(Testimony of Manuel Delatorre.)

were pretty accurate as to the payments made to all these concerns from business done previously.

The Court: But you don't mean to say that the only checks that bounced were checks you gave to Swanson, do you?

The Witness: Well, there were other checks that did bounce but it was in the latter part——

The Court: But you said checks bounced when Mr. Bone was still alive.

The Witness: I think there was just a couple of cases, your Honor, that they did. I mean they weren't in the habit of bouncing.

Q. (By Mr. Obrand): Let me ask you this, Mr. Delatorre. Did you ever tell Swanson—C. A. Swanson & Sons, that you were insolvent?

A. No, I didn't.

Q. On July 3rd of 1953, did you report to Dun & Bradstreet that you were doing a volume of \$250,000 a year business and that you had a net worth of some \$16,000? [36]

Mr. McDonnell: Just a moment. I am going to object to that. This Dun & Bradstreet statement has just been handed to me. I have never seen it before, but I don't see in there any indication that \$250,000 a year's business was done. All right, I see it now.

The Witness: There had been in there—previously, about three or four times before that I gave them that statement and they were hounding me to—all the time Dun & Bradstreet were over there all the time, so I just made any report to them.

(Testimony of Manuel Delatorre.)

The Court: But you did make the report?

The Witness: Yes, your Honor.

Q. (By Mr. Obrand): And did you tell them at that time——

The Court: Doesn't the instrument speak for itself, counsel? Is that a signed statement or not?

Mr. Obrand: It is their regular report issued at the request of C. A. Swanson & Sons and sent to C. A. Swanson in the regular course of business.

The Court: You may proceed.

Q. (By Mr. Obrand): Now, you stated a moment ago that you went to Willardson & Co., I believe their name was. And who else did you go to see? A. M. E. Fond.

Q. Only when C. A. Swanson cut your credit off about June 12, is that correct? [37]

A. That is right.

Q. Isn't it true that you dealt with M. E. Fond for a year or two before that? A. Very little.

Q. When did you first start dealing with M. E. Fond in a measurable quantity?

A. Just about the end of that time.

Q. About when was that in months?

A. Well, I would say around May and June.

Q. And what was the amount of your purchases monthly from M. E. Fond and Company?

Mr. McDonnell: I object to that question. I think that is irrelevant. I don't see what this is accomplishing. I don't mean to be obstreperous, your Honor.

The Court: What is the materiality, counsel?

(Testimony of Manuel Delatorre.)

Mr. Obrand: To show that this man was continuing in business and was doing business and that the defendant had no reason to believe that he was insolvent.

That is our main issue here as to whether they had reason to believe he was insolvent. The fact that they cut down his credit or even cut it off doesn't mean to say he is insolvent. They just didn't like the way he was paying his bills.

The Court: I suppose there is no question that he continued in business for some time—that is up until the time [38] this bankruptcy proceeding was filed.

Mr. Obrand: Your Honor, I was laying a foundation for a question I am going to ask him with reference to the proceedings in the bankruptcy case.

I have the file here which as you recall is entirely different from what he is testifying to now.

The Court: Proceed.

Mr. Obrand: May I ask the reporter to repeat my last question?

The Court: Read the question, Mr. Reporter.

(Question read as follows: "Q. And what was the amount of your purchase monthly from M. E. Fond and Company?")

Q. (By Mr. Obrand): Will you answer that, Mr. Delatorre?

A. Well, I did not only buy eggs from M. E. Fond, but I bought eggs from others, too, at that time.

(Testimony of Manuel Delatorre.)

Q. Well, you also bought from Willardson, I believe you said?

A. That is right. And I bought some eggs from Harris Produce.

Q. Can you give us an idea of the average amount you purchased monthly from each of those firms during the months of June, May, June and July of 1953?

A. I would say it would be almost equivalent to the same amount I was buying from Mr. C. A. Swanson, from all [39] these other brokers.

Q. Now, prior to May how much did you buy from each of these concerns monthly?

A. It is pretty hard to remember back that far, sir.

Mr. McDonnell: Wouldn't the records themselves be the best evidence?

The Court: I was thinking the same thing.

Mr. Obrand: I was trying to avoid taking the time of looking them up—holding the court up while we were looking for those records, but I guess I will have to refer to them.

Q. Are you acquainted with the books which were kept in your business, Mr. Delatorre?

A. I am.

Q. Can you refer to your ledger and show me what was purchased by you during the second four months of 1953 from the concerns you mentioned other than C. A. Swanson & Sons?

A. Yes, I imagine we can get that.

(Testimony of Manuel Delatorre.)

The Court: Apparently a lot of eggs were involved.

Mr. Obrand: They are getting kind of stale by now. While we are waiting, your Honor——

The Court: We will take a five-minute recess at this time.

Mr. Obrand: May I make a statement that will probably save some of the court's time?

This question of a disputed payment as clarified by Mr. [40] Mulherin, appears on our records in two separate payments and on different dates. So, actually there is no dispute as to the amounts having been received. It is merely a question of dates and the ultimate question here as to reasonable cause to believe on the part of C. A. Swanson & Sons.

Mr. McDonnell: They were all received after the 29th of May, were they not?

Mr. Obrand: On the 29th and after. One portion of it was received on May 29th and the \$1,849 on June 12.

Mr. McDonnell: You say received. That was the date——

Mr. Obrand: That is the date they appear on our records. That is all I can tell you about that.

The Court: We will take a five-minute recess.

(Short recess.)

The Court: You may proceed, gentlemen.

Mr. Obrand: May I speak from here, your Honor?

The Court: Yes.

(Testimony of Manuel Delatorre.)

Q. (By Mr. Obrand): Mr. Delatorre, will you show me the ledger sheet for M. E. Fond?

A. Yes.

Q. And there is no indication on this to show the year when your purchases from them started?

A. It was in 1952.

Q. That is September 15, 1952, you started dealing with them, is that correct? [41]

Mr. McDonnell: The books speak for themselves, your Honor.

The Witness: That was when I bought a few merchandise from him—very little merchandise.

Q. (By Mr. Obrand): You started dealing with him in September, 1952, isn't that correct?

A. I have been off and on dealing with Swanson for the past 20 years.

Q. I am talking about M. E. Fond Company.

A. I mean from M. E. Fond. I have been in the egg business all my life. Here is when I started doing business—on the 5th.

Mr. McDonnell: May the record show the witness is pointing to a figure 5 and then a line and then the figure 12.

The Witness: That is when I started buying eggs from M. E. Fond heavily and the same thing with Harris Produce.

The Court: Were you doing business with them on a cash or credit basis?

The Witness: Credit business.

The Court: Always?

The Witness: Yes, sir. And the Harris Produce

(Testimony of Manuel Delatorre.)

—here is where I started doing business with them in 1953. I bought \$2,072.25 from them—the same thing as Mr. Willardson.

The Court: You bought that on credit?

The Witness: Yes, sir; and the Great West, too. I got [42] some—here it is right here. I bought \$1,339.25 on credit off of them, too.

The Court: When was the last time you bought from them?

The Witness: That was 1953, the 7th and 8th.

The Court: You bought that on credit?

The Witness: Yes, sir.

Q. (By Mr. Obrand): Now, this Willardson—when did you start buying from them?

A. Well, off and on. I was buying a few eggs off of them. When I started buying heavily from them—it started right in here, on the 5th and the 12th and it comes down——

Q. What year? A. 1953.

Q. Were you buying from them on credit?

A. Yes, sir. I mean my credit was open with them up to the 7th and July 9. That was my last invoice.

Q. As a matter of fact while you started buying heavily from these people you were still buying from Swanson, were you not? A. No.

Q. You mean to say you had no purchases in May from Swanson?

A. Well, I did but—I mean that was about the end of May when they suggested I buy my eggs some place else.

(Testimony of Manuel Delatorre.)

Q. Well, let me see. When did you start buying heavily [43] here? A. May 12.

Q. Well, on May 19 didn't you buy some \$1,900 worth from Swanson? A. Yes.

Q. And on the same day didn't you buy \$1,635 worth?

A. Well, I mean those eggs were bought before—I had some eggs bought from them. They used to get a car of eggs in for me and I used to take them as I went along.

Q. But you bought from them? A. Yes.

Q. And on May 14, five days before that, didn't you buy \$1,500 worth from them?

A. Yes. I mean the only way I could get eggs from them was to pay them and then they released some eggs to me.

Q. Let me ask you this question, Mr. Delatorre. Did your purchases, your entire purchases from all concerns start increasing in May over what they had been in the past?

A. No. They started dropping because I had to leave go a lot of my accounts on account of I wasn't getting enough eggs to sell them.

Q. Well, I have looked over the Swanson statement for the rest of 1953 and I don't see any purchases in any amounts much greater than you were purchasing in May.

Mr. McDonnell: If your Honor please, I think this is [44] irrelevant because the complaint does not allege reasonable cause to believe or any preferential payments prior to May 29, 1953, and—

(Testimony of Manuel Delatorre.)

The Court: I think it is to this extent, counsel. If other concerns were extending him credit and he was operating a business it might be an element to be considered.

Mr. McDonnell: Very well, your Honor.

Q. (By Mr. Obrand): How about farmers? Were you buying from them?

A. Yes, I was buying.

Q. Where is the ledger sheet for farmers?

A. We didn't keep any. I mean we just kept our sheets.

Q. You kept no ledger sheets from farmers?

The Court: You bought on a cash basis?

The Witness: Yes.

Q. (By Mr. Obrand): Where are your cash records on that?

A. They should be over there.

Mr. Obrand: Not being able to identify them may I ask the witness to pick them out?

The Court: What difference does it make if he paid cash?

Q. (By Mr. Obrand): Do you know approximately how much you were buying per month from farmers in the first five months of 1953?

A. It is pretty hard to say. I mean that is a long time ago. [45]

Q. Was it as much as you were buying from Swanson? A. No.

Q. Was it as much as you were buying from Fond?

(Testimony of Manuel Delatorre.)

A. No. You see the only reason that we went out and bought eggs——

The Court: Counsel, if you want to go into that you will have to get the books, but I don't think it tends to prove or disprove anything in this case. He paid cash for them. He went out and bought merchandise for cash.

The only materiality of this evidence, it seems to me, is that it might tend to establish that he was doing business and buying merchandise on credit, all of which he has already testified to. In other words credit was extended to him by others than Swanson.

Mr. Obrand: Of course that is in line with our contention in this case, that my clients had no reason to believe the witness here was insolvent at the time they were dealing with him and receiving payments from him.

The Court: But what he bought for cash doesn't prove anything other than to show that possibly he didn't have any credit. That is the only thing it would show.

Mr. Obrand: My reason for asking——

The Court: He wasn't paying cash for anything he could get on credit, apparently.

Mr. Obrand: Very well, your Honor. I will abandon that. [46]

Q. (By Mr. Obrand): Did you in June of 1953 tell Mr. Elmo Cross of C. A. Swanson & Sons when he was there, about a chattel mortgage that you were making better than \$1,000 a week for yourself?

(Testimony of Manuel Delatorre.)

A. No.

Q. You did not? A. No.

Q. At the time you signed the chattel mortgage did you tell Mr. Elmo Cross that you would be able to pay it off in 45 days?

A. You mean the balance that I owed him?

Q. Yes. A. I don't think so.

Q. Is it possible that you said that?

A. I don't think so.

Q. You knew you had signed the chattel mortgage, didn't you? A. That is right.

Q. Did you thereafter offer to give a chattel mortgage on the same fixtures and equipment to Willardson?

Mr. McDonnell: I object to that question. I think that is immaterial. I don't think what offers of chattels he made to Willardson has any materiality with relation to Swanson.

Mr. Obrand: Except to show the defendant here has been [47] misled and that the witness was making statements to, misleading statements, to them in an effort to make them believe he was insolvent.

The Court: Well, Willardson is not involved in this action.

Mr. Obrand: No, sir, but the general information throughout the industry, and we will connect it up with our testimony, the general information throughout the industry was that this man was merely in a financial bind for the time being, but that he had ample assets and it was a question of liquidating those assets to put himself in a better position.

(Testimony of Manuel Delatorre.)

The Court: That is a matter of proof. I don't think your question tends to prove or disprove that.

Mr. Obrand: Very well, your Honor.

Q. (By Mr. Obrand): Were you telling other people in the industry during the months of June and July that you were solvent—that you were keeping up your business and that you were doing a good business and improving it?

A. I don't think so.

The Court: You weren't telling everybody that you were insolvent, were you?

The Witness: Well, I couldn't do that very well, your Honor.

The Court: You put your best foot forward, didn't you?

The Witness: That is right, sir. [48]

Mr. Obrand: That is all, your Honor.

Mr. McDonnell: I have no further questions. May Mr. Delatorre be excused?

Mr. Obrand: Yes, as far as I am concerned.

Mr. McDonnell: On second thought maybe I had better keep him here for a while.

The Court: Call your next witness.

Mr. McDonnell: That is the case for the plaintiff, if the court please.

Mr. Obrand: If the court please, I would like at this time to make a motion to dismiss the complaint on the ground that the plaintiff has not met his burden of proving the two things that are necessary for the maintenance of this action.

First is the question—I should say three things. First is the question of payments within the prohibited period, within the four-months period from the time of the filing of the bankruptcy.

The Court: I thought that had been stipulated to—that these payments were made in the four-month period.

Mr. Obrand: He has to prove all three things. I submit that he has failed to prove all three of them.

Admittedly the payments were made.

Secondly the plaintiff must prove the insolvency of the bankrupt. The fact of bankruptcy itself is some proof and I don't think anybody is going to argue that the bankrupt [49] was insolvent the last two or three months of his existence in business. However, as far as we are concerned the main burden of proof on the plaintiff is to show that the defendant C. A. Swanson & Sons had knowledge of the insolvency or had reasonable cause to believe the bankrupt insolvent.

We submit, your Honor, that the plaintiff has failed to meet the burden of proof in that respect. All that he has shown to the present moment is that the bankrupt was insolvent; that certain payments were received.

He has failed to show that they had reason to believe the defendant—had reason to believe the bankrupt was insolvent.

There is still another facet to this type of proceeding, your Honor, and that is even if the defendant would have believed that the bankrupt was

insolvent and even though the payments were made within the prohibited period, there is still an out for the defendant if it can be shown that the preference was not more than the other creditors have received or would have received and that has not been shown, your Honor.

As far as the knowledge on the part of the defendant is concerned, the bankrupt himself has testified that he not only told them nothing of his insolvency but he made it a point to withhold that information from them and from the rest of the trade. [50]

I have heretofore submitted authorities to your Honor at your request, and based upon the authorities which I have cited I at this time make a motion for dismissal of the action.

The Court: The motion will be denied, counsel.

Mr. Obrand: Shall I proceed, your Honor?

The Court: Yes.

Mr. Obrand: Mr. Cross, will you take the stand?

ELMO CROSS

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Elmo Cross.

Direct Examination

By Mr. Obrand:

Q. Mr. Cross, what is your business or occupation?

A. I am assistant manager of C. A. Swanson & Sons, frozen foods.

Q. How long have you been in that capacity?

A. It will be three years this May.

Q. Were you working in that capacity in the early part of 1953? A. Yes, sir.

Q. And at all times were you in that capacity when your firm was dealing with Manuel Delatorre who was operating as the R & M Egg Farms? [51]

A. Yes, sir.

Q. Is there anyone other than yourself who handled the credit extension to Mr. Delatorre?

A. As far as issuing the actual credit, no. I gave the actual credit and worked with our credit manager on it.

Q. So that all those things were done under your direction and supervision? A. That is right.

Q. Did your company have a definite credit practice with respect to Mr. Delatorre whom afterwards we will refer to as the bankrupt?

A. Our credit terms with Mr. Delatorre had been on a two-week basis and he had been very prompt

(Testimony of Elmo Cross.)

with his payments up until the time of Mr. Bone's death.

A short time before that he finally got a little behind but most of the time it had been paid on the basis of every two weeks.

Q. And thereafter what happened?

A. After the time of Mr. Bone's death, well, checks—we had several checks come back and of course in the meantime we had been allowing merchandise to go along because his account had been good but after Mr. Bone's death, why, we called Manuel and he stated that her lawyer—his wife—Mr. Bone's lawyer had tied up his account and that was the reason the checks returned, which we believed and considered [52] could be the situation.

He said that in a period of two weeks after the time of his death, until he got it cleared, that he would pay off Mr. Bone's wife, approximately \$4,000, for her share of the business and to send the checks through again and they cleared.

Q. Did you make periodic checks with credit agencies for information on Mr. Delatorre and other customers?

A. Yes. It is the policy of our company—we belong to the Dun & Bradstreet and we ask for credit information at least once or twice a year from all the accounts we sell.

We also ask from the individual customer for a financial statement, if we can obtain one, which we did from Mr. Delatorre, but he never gave us one. He kept promising us one but never gave us one, so we relied on Dun & Bradstreet for our information.

(Testimony of Elmo Cross.)

Q. Did he ever give you any verbal information as to his assets or net worth?

A. Yes, he has.

Q. When was the first time he gave you any information on that?

A. Well, the first time we questioned him on it was at the time of Mr. Bone's death before any question came up. Like I said before, his payments had been prompt on a two-weeks schedule and at the time of Mr. Bone's death he said it was just a matter of a couple of weeks to get it cleared up [53] with the lawyer and everything would go along just like it had before. In fact he said he thought he could do a better business without Mr. Bone being there; that he had held him down and after that time, even in May and up into June when we were asking for payments on his account, he told us he was making as much as \$1,000 a week on his grocery store and egg account and it would be a matter of 45 days until he got our account cleaned up.

Q. Did you ever receive any information prior to receiving the notice of bankruptcy, to the effect that Mr. Delatorre was insolvent? A. No, sir.

Q. And the first information you had of that was the knowledge that he had become a bankrupt?

A. The first knowledge I had of it was the day after Mr. Fond and Mr. Willardson had gone down to his place and had pressed him for payment and taking the cash sales he received in the store that day they called me the next day and that was the first time I knew of it.

(Testimony of Elmo Cross.)

Q. Was there anyone else in your organization who could have received that information beside yourself? A. No, sir.

The Court: Who is the company you represent?

The Witness: C. A. Swanson & Sons.

The Court: Who are they? [54]

The Witness: Frozen food distributors, canned poultry products and frozen chickens.

The Court: They are processed here?

The Witness: No. This is a sales office.

The Court: Processed where?

The Witness: We have plants all over the United States. Most of our plants are in the midwest—Iowa, Nebraska and Minnesota.

Mr. Obrand: Your Honor, may I make an explanation? I am about to question the witness with reference to a Dun & Bradstreet report. I am only interested in one sheet, the sheet dated July 3, 1953.

We have here a collection of sheets representing the history of this bankrupt from Dun & Bradstreet but I would prefer to keep the file intact for my client's sake, and for the purpose of withdrawal later. Our only reference is to the sheet dated July 3, 1953.

Mr. McDonnell: Do I understand, Mr. Obrand, that you are offering these in evidence?

Mr. Obrand: I am. You are going to waive foundation.

Mr. McDonnell: I will waive foundation. Just offer them.

(Testimony of Elmo Cross.)

Mr. Obrand: Then I am offering it in evidence, your Honor, as a credit report from Dun & Bradstreet received by C. A. Swanson & Sons, represented by Mr. Elmo Cross, and done in the [55] regular and ordinary course of business after a request of Dun & Bradstreet.

The Court: It will be marked as an exhibit.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

DEFENDANTS' EXHIBIT A

Dun & Bradstreet, Inc.

Rating Unchanged

5053—54x91

R & M Farms

OR 53 June 26, 1952

W & R Eggs & Dairy Products

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Robert D. Bone, Partner

J. Manuel Dela Torre, Partner

Rating: G 3½

Synopsis

Background: Partners started business December 1, 1951. One partner with Department of Agriculture 20 years; other in egg business fifteen years.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Net Worth: \$6,820.

Payments: Prompt.

Sales: \$15,000, monthly.

Condition & Trend: Cash and receivables cover debts. Volume increasing; provide partners living.

History

Partners registered trade style December 1, 1951; used general conduct of business.

Partnership formed, active operations commenced December 1, 1951; starting capital \$5,000 derived from savings.

Bone born in Illinois, 1886, married. 1931-51 employed, Department of Agriculture as Civil Service employee. Left that position to enter this venture.

Dela Torre, 37, married, born in Arizona. For past fifteen years has been employed by various egg companies, latterly with Holland Egg Products, Los Angeles, two years as salesman.

Operation—Location

Retails (25%) wholesales (75%) eggs and carries small line of dairy products. Wholesales to markets on 7-day terms; retail sales for cash, to local trade. 15 to 20 accounts carried, territory covers Los Angeles County. One employed.

Rents one-story stucco building located suburban business district. Space occupied measures 18 x 42 feet. Premises well kept.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Financial Information

Estimated financial condition at June 26, 1952

Assets

Cash in bank	\$ 2,000
Accounts Receivable	3,000
Merchandise (cost)	3,450
<hr/>	
Total current	\$ 8,450
Fixtures & equipment	750
Deposits	45
Prepaid expenses	75
<hr/>	
Total assets	\$ 9,320

Liabilities

Accounts payable	\$ 2,000
Owing on fixtures & equipment	500
<hr/>	
Total current	\$ 2,500
Net worth	6,820
<hr/>	
Total	\$ 9,320

Net sales, \$15,000 monthly. Salaries and drawings of owner, \$650. Net profit over and above salaries and drawings of owner, \$100. Monthly rent, \$75. Lease expires, November 30, 1952. Fire insurance on merchandise, \$2,000; fixtures, \$1,000.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Signed June 26, 1952, R & M Farms by Robert D. Bone, Partner.

Bone stated volume has increased substantially since operations commenced with present sales running \$15,000 monthly. Stated profits are small as they are selling on narrow margin in order to obtain new accounts. Monthly payments on fixtures and equipment, \$80.

Low four figure cash balance confirmed local bank; no loans requested.

Payments

HC	OWE	P DUE	TERMS	June 26, 1952
3000	1500		Net 30	Ppt Sold 12-51 to date
2000	500		Net 30	Ppt Sold 6 mos.
500			Net 30	Ppt Sold 1-52 to date

6-27-52 (80 925) ONE W124

[Pencilled in margin]: 4/13/53—Fixtures (incl. trucks) worth \$7,000.00. Owe partner at death, \$4,000-\$4,500. Manuel's equity, \$4,500.00.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Dun & Bradstreet, Inc.

Special Notice

74—951

5053—54x91

R & M Farms

SN 53 April 6, 1953

W & R Eggs & Dairy Products

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: (Investigating) G 3½

The following information is reported from a news item in: Los Angeles Times, Los Angeles, Calif., April 1, 1953.

Robert D. Bone, wholesale egg distributor, died on March 29, 1953. 4-6-53 (905).

[Stamped]: April 9, 1953.

* * *

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Dun & Bradstreet, Inc.

Special Notice

74—951

5053—54x91

R & M Farms

Hawthorne Egg Town

Dela Torre, J. Manuel, Owner

SN 53 July 31, 1953

Wholesale and Retail Eggs & Grocery

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: (Investigating) F 31½

The following information is reported from public records:

Item: Chattel Mortgage #2460.

Amount: \$12,327.

Date Entered: June 15, 1953.

Mortgagor: (Borrower) J. M. Dela Torres
(R & M Farms), 1221 So. Hawthorne.

Mortgagee: (Lender) C. A. Swanson & Sons.

Property Covered: Certain fixtures and equipment.

Further Details:—

7-31-53 (905)

[Stamped]: Aug. 6, 1953.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Dun & Bradstreet, Inc.

Rating Change

5053—54x91

R & M Farms

Hawthorne Egg Town

Dela Torre, J. Manuel, Owner

CD 53 July 3, 1953

Wholesale and Retail Eggs & Grocery

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: F 3 to F 3½

Synopsis

Background: Started as partnership December, 1951; one partner died March, 1953, and present owner succeeded; previously employed same line over 15 years.

Net Worth: \$16,640.

Payments: Prompt to slow.

Sales: \$35,000, monthly.

Condition & Trend: Cash and receivables cover debt, but slow receivables have caused slowness in meeting trade obligations. Volume increased, profitable.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

History

Owner registered trade style, R & M Farms, April, 1953, used general conduct business. Style, Hawthorne Egg Town registered by Dela Torres and D. Bone, March, 1952, used principally advertising purposes. Has not been re-registered by present owner.

Business originally started as partnership between Dela Torre and Robert D. Bone, December 1, 1951, starting capital \$5,000 derived from savings. March 29, 1953, Robert Bone died and Dela Torre purchased Bone's interest from estate, approximately \$4,000 derived savings.

Dela Torre, born California, 1916, married. Has been in egg business most of adult working career, having been employed by various egg companies in selling capacity including Joe Feingold three years and latterly with Holland Egg Products, Los Angeles two years.

Operation—Location

Retails 25%, wholesales 75%, eggs and carry small line of groceries and dairy products. Wholesales to markets on 7-day terms, retail sales for cash to local trade. 45 accounts carried, territory covers Los Angeles County. Owner active, assisted by his family. No outside help employed.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Rents one-story stucco building located suburban business district. Space 18 x 60 feet, premises well kept.

Financial Information

Estimated financial condition at April 10, 1953

Assets

Cash in bank	\$ 4,000
Accounts receivable	14,000
Merchandise	8,000
<hr/>	
Total current	\$ 26,000
Fixtures & equipment	6,500
Deposits	140
<hr/>	
Total	\$ 32,640

Liabilities

Accounts payable	\$ 15,000
Owing fixtures & equipment	1,000
<hr/>	
Total current	\$ 16,000
Net worth	16,640
<hr/>	
Total	\$ 32,640

Net sales \$35,000 monthly; salaries and drawings of owners \$650; net profit over and above salaries and drawings of owners \$750; monthly rent \$140; lease expires 10 years.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Fire insurance on merchandise, \$6,500; fixtures, \$4,500.

Signed April 10, 1953, R & M Farms by J. M. Dela Torre.

July 3, 1953, Dela Torre, owner, stated volume for 1952 totaled \$250,000, or approximately \$20,500 monthly average and have continued to increase, until currently they are running \$35,000 monthly. Since operations commenced, he estimated volume has increased, 100%, retail sales are running about \$7,000-\$8,000 a month, with wholesale running \$25,000-\$30,000 monthly. Profits estimated at 4%. \$1,000 owing on fixtures and equipment payable \$55 a month.

Accounts receivable all stated to be current and collectable with exception of approximately \$5,000 which runs 14-21 over the normal terms.

Medium four figure cash balances confirmed at local bank, no loans requested.

Payments					
HC	OWE	P DUE	TERMS	April 10, 1953	
10000	8500		N 30	Ppt	Sold 1 yr. to date
5000	5000		N 30	Ppt	Sold yrs.
2000	1500		N 30	Ppt	Sold 1952 to date
June 3, 1953					
1100	655			Ppt	Sold 11-51 to 5-53
155	102		Weekly	Ppt	Sold 4-53 to date
19045	11900		N cash	Slow 7-21	Sold 12-51 to 5-53
17600	14241	10775	N cash	Slow 21	Sold 12-51 to 5-53
(5)			Cash	Our request	
2500	950		Weekly		Sold 2-53
7-24-53 (48 939) (W125) (T)					

(Testimony of Elmo Cross.)

Defendants' Exhibit A—Continued)

Dun & Bradstreet, Inc.

Report—Special Notice

74—951 dup

R & M Farms

Hawthorne Egg Town

Dela Torre, J. Manuel, Owner

SN 53 December 10, 1953

Whole & Retail Eggs & Grocery

N

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: — to N.Q.

As previously reported an involuntary petition in bankruptcy was filed against the business on August 20, 1953.

On September 9, 1953, Dela Torre was adjudicated bankrupt. Schedules listed liabilities \$39,266; assets \$15,610; exempt \$13,750; Case 57809, D. B. Head, referee.

12-10-53 (31 907)

* * *

(Testimony of Elmo Cross.)

Q. (By Mr. Obrand): Now on July 3, 1953, or within a few days afterwards, you still didn't know anything about any insolvency on the part of Manuel Delatorre, did you?

Mr. McDonnell: I object to that question. The witness is counsel's own witness. There is no sense putting the words in his mouth. Let him testify.

The Court: He already testified that he didn't know anything about insolvency until the insolvency was declared—until the bankrupt was declared insolvent.

Mr. McDonnell: That is right.

Mr. Obrand: I was asking a preliminary question because he has already testified to that, your Honor.

The Court: Is it necessary to ask a preliminary question in view of the fact that he already testified to it?

Mr. Obrand: Probably no, your Honor.

Q. (By Mr. Obrand): At the time you received payments—I can't ask that without first asking the witness if he received payments unless counsel will stipulate that we received those payments. [56]

Mr. McDonnell: We allege that they received the payments.

Mr. Obrand: I didn't want to ask the witness and be subjected to an objection on the ground of not laying a proper foundation.

Q. (By Mr. Obrand): You did receive payments in June and July from the bankrupt, did you not? A. Yes, sir.

(Testimony of Elmo Cross.)

Q. And those are the payments which we have admitted in our respective pleadings?

A. Yes, that is right.

Q. At the time you received any of those payments were you aware of any insolvency on the part of the bankrupt?

A. No, sir. At no time did we know he was insolvent until the time the boys told us on the last day.

Q. Were any of these checks—when these checks came back did that cause you to believe that the bankrupt was insolvent?

A. Will you repeat the question?

Q. When any of the checks came back did that cause you to believe or become concerned over the bankrupt being insolvent?

A. We were concerned naturally, on any checks returned but he always had a good answer for us which we believed, like the first time when Mr. Bone died. He said that the lawyer had tied up his account and the second time when the [57] checks came back he said to send them back and we did and the bank sent them back and he said the bank was holding his checks that he received from his customers and they had to clear before our checks went through and at no time did we know the checks didn't clear.

Q. Did you check with his bank on any occasion?

A. Did we check with his bank?

Q. Yes.

A. Not until the tail end of the deal when we

(Testimony of Elmo Cross.)

went to the bank and got a cashier's check from him.

Q. Did his bank give you similar stories with respect to the bad checks—that is similar to the ones Mr. Delatorre gave you?

Mr. McDonnell: To which I object as calling for a hearsay answer.

The Court: Did he make any inquiry of the bank? What their answer may have been is a different matter. As a matter of practice a bank wouldn't tell you anything about his account.

Mr. Obrand: That is what we are trying to bring out.

The Court: At least when I practiced law I could never get any information out of them.

Mr. McDonnell: Maybe C. A. Swanson & Sons can get more information than some of the attorneys, Judge.

Q. (By Mr. Obrand): Did you on June 12 or thereabouts [58] threaten Mr. Delatorre, for the purpose of getting a chattel mortgage from him?

The Court: That calls for a conclusion. Just tell what happened. Let him tell the story about the chattel mortgage.

The Witness: Your Honor, if I could—I think that would be better myself. Mr. Elliott and I, who isn't here, I am sorry to say, right now, was our credit manager and a year ago he was taken sick and contracted a disease, tuberculosis, and he is in Olive View Sanitarium.

Mr. Elliott and I at the same time worked with Mr. Delatorre in the sales and credit and Mr. Elliott

(Testimony of Elmo Cross.)

and I went out to Manuel's place at the time our account built up because of two or three checks that bounced and were returned from the bank. His account got higher than we wanted it to get and so to protect ourselves—in other words to go out and see how he stood, Mr. Elliott and I went out and looked over his business. He had a nice stock on his shelves and he had freezer equipment and a nice stock of eggs and he had trucks and candling equipment. He was very co-operative. He showed us the entire place. We asked how he was getting along and he told us that it was tough after Mr. Bone died but he was making money now and coming along swell.

We asked him if he had any objection to us taking a mortgage on his fixtures and equipment to protect ourselves for the amount of money which had gotten up through the bad [59] checks. We had no intention of letting his credit get that high. He said he had no objection and we asked him if there were any other mortgages on the equipment, which he stated there was not.

So, we listed the equipment, the freezers, the cabinets, the coolers, the candling benches and trucks and fixtures that he had and had him come in two or three days later and sign it.

We did not tell him he had to sign anything. He voluntarily went around with us at the same time Mr. Elliott and I were out there and we asked if we could look at his books. We did not go through

(Testimony of Elmo Cross.)

his books completely. We glanced through them to see what he owed other customers. We paged through his books, his accounts payable and they weren't too heavy and we went through the accounts receivable. I think at that time they were about \$10,000 or \$12,000. In our own minds after a rough sketch we figured his net worth if he had to liquidate would be \$14,000 or \$15,000 which convinced us that his mortgage was good.

We put him on a cash basis because we do that with all our accounts—anybody that gets into us too heavily we will put them on a cash basis until they get back on their feet when we give them credit terms again. That is the normal practice of business.

Q. (By Mr. Obrand): Did you during the month of July, [60] 1953, have correspondence with your main office with respect to the credit of Mr. Delatorre? A. I think we did.

Q. Was there at that time any of the correspondence which expressed any concern over the insolvency of Mr. Delatorre?

A. At that time our Omaha office or both agreed, probably agreed we were extending too high a credit, but at the same time in our letters we stated we felt the risk was good—that is payment was prompt until the time of Mr. Bone's death. We figured the account was good.

Q. Did you also in the regular course of your business ask for credit reports on your customers from the Credit Interchange Bureaus?

(Testimony of Elmo Cross.)

A. Yes, we have.

Q. I don't know whether it is called a "credit managers association" or "Credit Interchange Bureau." I will show you a sheet dated July 7, 1953, and ask you to identify it.

A. That is the report received from the Credit Interchange Bureau from our inquiry to them in regard to the Delatorre account.

The Court: What date was that?

The Witness: July 7, 1953.

The Court: Is there anything in that report indicating he was insolvent? [61]

The Witness: No. In the comment it says "improving his position."

Q. (By Mr. Obrand): And in your dealings with Mr. Delatorre were you relying on information which you received from the various credit agencies?

A. Yes, sir, that combined with the information that Mr. Delatorre gave us.

Q. And did you make inquiry from competitors as to whether they were dealing with Mr. Delatorre? A. Yes, sir.

Q. That was also your normal practice, was it not? A. That is right.

Q. And did you find out anything from your competitors which would cause you to believe that Mr. Delatorre was at any time—was insolvent during the months of May, June and July?

Mr. McDonnell: I will object to that. That calls for a hearsay answer by the witness, what the competitors told him.

(Testimony of Elmo Cross.)

The Court: Did you get any information from any of them to that effect?

The Witness: The information I got, your Honor, was after the time that Mr. Willardson and Mr. Fond were out to his place and they closed him up that day. That was the first information or any inkling we had he was in that bad shape.

The Court: Well, the bankrupt testified when you took [62] the chattel mortgage you told him you were going to put him on a cash basis.

The Witness: Yes.

The Court: And to buy from other concerns.

The Witness: Mr. Delatorre was buying from Farmers at the time and had been for years. In fact prior to that time—in other words he was buying direct from the farmers throughout the period he was in business and there were times prior to this time in that same year we were buying the surplus that he had, that he bought direct from the farmers and he was also buying from Fond, Willardson and other brokers.

The Court: Did you tell him to go buy from other people?

The Witness: No, sir. We put him on a cash basis. He could have come in and bought from us with cash, but the amount of credit he had built up through his bad checks and when we thought it was bad policy to issue more credit, when we got his balance down we would put him back on two weeks credit terms, which we do when an account gets out

(Testimony of Elmo Cross.)

of line or too high. You have to put them on a cash basis to reduce it.

When we put him on a cash basis and if he didn't have the cash he had to go to the other brokers to buy, probably.

Mr. Obrand: No further questions, your [63] Honor.

Cross-Examination

By Mr. McDonnell:

Q. Now let me see, Mr. Cross. Was Mr. Elmo the name of the man who went out with you that day? A. Yes, sir.

Q. To Mr. Delatorre's place of business?

A. Yes, sir.

Q. When was that, do you recall?

A. It was in June.

Q. What part of June?

A. The fore part of June.

Q. Was it around the 5th?

A. It could have been. I don't recall the exact day. It has been two years ago.

Q. You and Mr. Elliott went out that day?

A. Yes, sir.

Q. What did Mr. Elliott do in your organization, Mr. Cross?

A. Accountant and credit manager.

Q. And you, of course, supervised him?

A. He was under my jurisdiction.

Q. Did you set the credit policy or did he?

A. I did, working with him.

(Testimony of Elmo Cross.)

Q. You say he was the accountant?

A. Yes, sir. [64]

Q. Being his supervisor would you say he was an expert accountant?

A. He was a very good accountant.

Q. Wasn't he a public accountant?

A. He was not a C.P.A.

Q. But a licensed public accountant?

A. I think so, sir.

Q. And so far as you know pretty expert with a set of books? A. That is right.

Q. And he had been with your organization a number of years, had he?

A. He had been with us two years I think, a year and a half or two years.

Q. Did you have any reason to think he was inefficient or inaccurate in his work?

A. No, sir.

Q. You heard Mr. Mulherin and the other accountant testify this morning that the books showed on their face, after November, 1952, that this business was insolvent. Indeed the other accountant testified it was insolvent by more than \$10,000 at the end of March. Did you hear that?

A. That wasn't our books. They were Mr. Delatorre's books. Mr. Elliott did not make a complete audit of his books. [65]

Q. Did you hear the testimony this morning?

A. Yes, I did.

Q. Now, how long would you say Mr. Elliott worked on the books? A. On his books?

(Testimony of Elmo Cross.)

Q. Yes, on Mr. Delatorre's books that day.

A. He didn't work on them at all. He just glanced through the pages.

Q. But they were all there on the table for him to look at?

A. They were opened up to the accounts receivable and payable.

Q. Mr. Delatorre laid them down and said, "Here they are, go through them"?

A. What we had of them.

Q. And Mr. Elliott did go through them?

A. Paged through them. He didn't write down figures. He just paged through them.

Q. You mean he missed a \$10,000 insolvency condition? A. That is absolutely correct.

Q. And that was the same day you asked for the chattel mortgage, isn't that right?

A. That is right.

Q. When did you ask for it that day? Before or after Mr. Elliott looked through the books? [66]

A. We asked for it at the same time. We asked for the mortgage, I think, when we went out there and asked if we could page through the accounts receivable and accounts payable.

Q. You walked into the door and said, "We will take a chattel mortgage," is that what happened?

A. We went in and visited with him in the normal terms of business and we asked him the amount of—we asked him because of the amount of money we extended him and the amount of money

(Testimony of Elmo Cross.)

he owed us would he object to giving us a chattel mortgage.

Q. Do you usually take chattel mortgages on your accounts' equipment and fixtures?

A. We do if they get out of line, in the line of credit.

Q. How many other chattel mortgages did you take in 1953?

A. I didn't take any other in 1953 because we had no other trouble.

Q. How about 1954? Did you take any chattel mortgages in 1954? A. No, sir.

Q. This was the only one you took in two years' time?

A. That is right. As a matter of fact in 1954 we got out of the egg business. [67]

Q. Did you take an inventory?

A. We didn't take an inventory, no, sir.

Q. Who made the chattel mortgage up?

A. Who made it?

Q. Drew it up physically.

A. I think Mr. Elliott drew it up.

Q. Did Mr. Elliott go around and count the things that were in the store to put in the chattel mortgage—make a list of them? A. No, sir.

Q. Where did he get the list?

A. We took fixtures and not stock.

Q. That is what I mean. You went around and made a list? A. We checked the fixtures, yes.

Q. And the trucks?

A. Yes, and the candling equipment.

(Testimony of Elmo Cross.)

Q. Isn't it a fact you took every item in that store with the exception of the stock in trade and put it in the chattel mortgage?

A. I think so—anything that we saw that had any value.

Q. You were going to get yourselves in the position where you couldn't lose on this account, isn't that right?

A. We were trying to protect ourselves on the credit [68] we had given him.

Q. You were pretty far extended?

A. Yes, with the bad checks. Had the checks not returned our terms would have been right along the same as they had been.

Q. You have been telling us that your account was 15 days. Is that right or was it 30 days?

A. 15 days.

Q. Had it ever been 30 days?

A. With Delatorre it was 15 days all the way through.

Q. Could Mr. Elliott have made it 30 days without your knowledge?

A. It could have been extended out to 30 days but his terms were 15 days.

Q. You heard Mr. Delatorre testify this morning that around the 1st of May the credit period was cut, he said, from 30 to 10 days. Is that true or untrue? A. It was never 30 days credit.

Q. Was it reduced?

A. It could have been reduced from 15 days to 10 days.

(Testimony of Elmo Cross.)

Q. You are not sure of that?

A. That was two years ago.

Q. Would that have been within Mr. Elliott's jurisdiction, to cut it two weeks—two weeks to 10 days? [69]

A. It could have been either one.

Q. But Mr. Elliott could have done it, is that right?

A. It is possible. He would have told me and I would have told Mr. Delatorre. He would not have told Mr. Delatorre directly.

Q. Mr. Elliott didn't deal with Mr. Delatorre?

A. Not directly. I did the selling to Mr. Delatorre.

Q. When did the checks first start to bounce? In May, was it? Toward the beginning or toward the end of May?

A. If they bounced—right after Mr. Bone died—at the time of his death, like Mr. Delatorre said, his wife's lawyer tied up his account and at that time checks started bouncing.

Q. You were getting Dun & Bradstreet reports and checking credit information generally?

A. That is right.

Q. Why did you also make a check of his books if you had all these other sources of information?

A. Normal practice. If you are out there asking a man a simple question—we asked him for a financial statement which he promised to give us right along and never gave to us.

(Testimony of Elmo Cross.)

Q. Didn't that make you suspicious of what his financial statement might show?

A. It should have but we have had it happen time and time again. We never followed it [70] through.

Q. You know better now?

A. We know better now. We got out of the egg business. We have had too many experiences with it.

Q. Now, let me see. When you got these bad checks did you request that some other kind of check be given you? A. Those bad checks?

Q. Yes. You had been getting checks that came back because of not sufficient funds. Did you ask for certified checks?

A. We did after the first two or three times. The first time he told us to run them through—run the checks through again and we did and in another week or a period of 10 days they bounced back again and at that time we said: "Here, what is going on now. Everything is going to pieces."

And he gave a statement that the banks were withholding his money and not clearing his checks until the checks he got from the merchants had already cleared their banks and that was delaying it another five or 10 days. So he said he was going to change banks, which I think he did.

Q. Did you ask for certified checks?

A. After he changed banks and they bounced again we did.

Q. Then you knew for sure he was in trouble when they bounced from the new bank?

(Testimony of Elmo Cross.)

A. We didn't know he was in trouble but we knew the [71] checks were bouncing.

Q. But that is not the usual course of business with your dealers, is it—their checks bouncing two or three times from two or three banks?

A. It is not a normal course. We have had it happen in business and we have always had checks bounce and then put him on a cash basis and then restore him to credit a year later.

Q. You asked for cashier's checks?

A. Yes.

Q. And you got them?

A. We did get some cashier's checks. We also took his regular checks that were post-dated and put them through at a later date.

Q. After June 22nd, as a matter of fact, you got nothing but cashier's checks, isn't that right?

A. I couldn't tell you, sir.

Q. You just know that you got to the place where you wouldn't accept his checks?

A. No, sir; we took his checks at any time after that date. We continued to take his checks.

Q. How is it you got cashier's checks if you took any of his checks.

A. We took cashier's checks—in other words a check in the hand was better than no payment at all and Manuel's [72] word had always been good.

Q. Did you threaten to foreclose the chattel mortgage? A. No, sir.

Q. You were here in court when your attorney referred to this chattel mortgage this morning in a

(Testimony of Elmo Cross.)

discussion of this matter, as a whip to hold over the head of Mr. Delatorre?

Mr. Obrand: I object to that as being argumentative. I was just making a statement to the court. It was not testimony and it was not the words of this witness.

Mr. McDonnell: I didn't assume it was. I asked the witness if that was correct—that the chattel mortgage was held as a whip.

A. The chattel mortgage was taken strictly as a precautionary measure to protect the high amount of credit.

Q. (By Mr. McDonnell): Did you think he might not be able to pay the debt and you wanted something to foreclose on?

A. The day we looked through his books and took his inventory and started to make up the chattel mortgage we both made the statement that we were sure Manuel was in good shape—that he had had a little trouble before that.

Q. But you went right ahead and took the chattel mortgage anyway? A. That is correct.

Q. You were going to protect yourselves?

A. Naturally, wouldn't you? [73]

Mr. McDonnell: I have nothing further.

The Court: Is that all?

Mr. Obrand: That is all, your Honor.

The Court: Any further evidence?

Mr. Obrand: No further evidence on behalf of the defendant, your Honor.

The Court: We will take a recess until 2:00

o'clock, gentlemen, and I will hear whatever argument you have.

Mr. McDonnell: Would you prefer to hear the argument at 2:00 o'clock?

The Court: I don't want to hear it before lunch and I am not going to eat eggs either.

Mr. McDonnell: Before the plaintiff rests may I recall Mr. Delatorre for just one question?

The Court: Yes.

MANUEL DELATORRE

the defendant herein, called as a witness on his own behalf, having been previously sworn, was recalled and testified further as follows:

Direct Examination

By Mr. McDonnell:

Q. Mr. Delatorre, the plaintiff has alleged here and I think it is now substantially admitted, that after May 29, 1953, you paid to the C. A. Swanson & Sons \$12,267 on this account. [74]

Keeping in mind your other creditors, did any of your other creditors receive similar payments—not in that amount but percentage-wise on their accounts during that time?

A. They did.

Q. Did all of your creditors receive similar payments? A. Well, not all of them.

Q. There were some that did not receive as much? A. That is right.

Mr. McDonnell: I have no further questions.

(Testimony of Manuel Delatorre.)

Cross-Examination

By Mr. Obrand:

Q. And were the other creditors who received those payments in substantially the same position with respect to their accounts with you as C. A. Swanson & Sons?

Mr. McDonnell: Counsel, I don't understand that question. What do you mean by "substantially the same position"?

Mr. Obrand: That he was indebted to them and unsecured in a sizable amount.

The Court: You gave them checks for money you owed them?

The Witness: That is right.

Q. (By Mr. Obrand): And they received payments also in June and July?

A. Well, I don't think so. There was Harris Produce. I never even got a chance to give them a nickel or Great West Egg Company. [75]

Q. Didn't M. E. Fond receive substantial amounts in June and July?

A. Well, not exactly because I owed them more than I paid them.

Q. Well, I mean you gave them large payments in June and July, didn't you?

A. Not as big as I gave to Swanson. You can see it right there in the ledger.

Q. But you owed Swanson a lot more than you owed M. E. Fond?

A. Sure, but you couldn't give them that much. Where was I going to get the money from?

(Testimony of Manuel Delatorre.)

Q. Did you give the other creditors payments after you paid C. A. Swanson?

The Court: Aren't his records the best evidence of that?

Mr. Obrand: Yes, but counsel asked the general question and I was cross-examining in the same general vein. I have asked for the records. I presume, your Honor, that there will be no objection if we submit the bankruptcy file to this court as part of the evidence.

Mr. McDonnell: I think there will be. I mean the bankruptcy file is probably an inch or two inches thick. I don't know why all of it or a major part of it should be pertinent in this matter. [76]

Mr. Obrand: Except the court may examine any portion of it his Honor feels pertinent. I have no objection to his examining any part of it.

The Court: It is part of the records of this court.

Mr. McDonnell: I imagine the court can read any part he wants but I thought counsel was offering it in evidence.

Mr. Obrand: I am offering the file in evidence but it is not necessary when it is a part of the records of the court.

Mr. McDonnell: I just want to be certain if there is an appeal in this matter that we have a clear, clean record.

The Court: Well, I will give somebody grounds to appeal if you people can't settle this case. These cases are tragedies and the court isn't very sympathetic with this type of an action.

(Testimony of Manuel Delatorre.)

While I am fully aware that the bouncing of a check in itself is not evidence of insolvency but the courts have held that where checks have bounced it is sufficient evidence to support the court's findings, but they haven't found any decisions that hold that that in itself is sufficient. But this whole thing has a bad taste to it on both sides. I haven't any sympathy with the bankruptcy court giving money to pay attorney fees and the creditors get less and less and pay all the expenses involved. I don't like to take something away from somebody to give to somebody else.

While I have no objection to an attorney getting his fee [77] I don't like for him to get them at the expense of somebody else.

I will see you gentlemen at 2:00 o'clock and I think you should discuss some adjustment in this matter.

Mr. McDonnell: We will discuss it during the noon hour, your Honor.

The Court: It is going to work a hardship either way I decide it and while I realize the burden is on the plaintiff I will have no difficulty in deciding the case. And when I do neither one is going to be happy with it.

Mr. McDonnell: We will be back at 2:00 o'clock.

The Court: I think it would be better if you went out and had lunch together.

Very well, gentlemen, 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [78]

Wednesday, February 2, 1955; 2:00 P.M.

The Court: Gentlemen, pursuant to our discussion in chambers, I think I will take this case under submission. There is a factual question here.

I do feel, however, that I should have the benefit of counsel's comments in view of the evidence and the law that applies to the facts as they have been introduced.

I have had your points and authorities and I would like to have the benefit of your comments. I want to say this. I think, if counsel already doesn't know it, I am one of those individuals who can read better than I can listen. I am familiar with the evidence now, but I think I will let each of you file simultaneous briefs within 30 days and if there is any particular part of the evidence that you want to quote you will have to make arrangements with the reporter.

Mr. McDonnell: Thank you very much, your Honor.

The Court: I don't want any guesses as to what the testimony shows.

Mr. Obrand: Very well, your Honor.

(Whereupon at 2:10 o'clock p.m. the above-entitled matter was concluded.) [79]

Certificate

I, J. D. Ambrose, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of June, 1955.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed June 28, 1955. [80]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 59, inclusive, contain the original

Reply to Request for Admissions.

Answer.

Designation of Record on Appeal.

Supplemental Designation of Record on Appeal.

Notice of Appeal.

Order Extending Time for Filing and Docketing Appeal.

Complaint.

Findings of Fact and Conclusions of Law.

Interrogatories by Plaintiff.

Judgment.

Memorandum Opinion.

Minutes of the Court, dated Feb. 2, 1955;
Mar. 16, 1955; Mar. 25, 1955, and Apr. 11, 1955.

Motion for New Trial.

Names and Addresses of Attorneys.

Reply to Interrogatories.

Request for Admissions.

Statement of Issues.

Copy of Supersedeas Bond.

Stipulation and Order for Supersedeas Bond.

which, together with a full, true and correct copy of 1 volume of Reporter's Transcript of proceedings had on February 2, 1955, and the originals of Defendants Exhibit A, and Plaintiffs Exhibit 1, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in said cause.

I further certify that my fees for preparing the foregoing record amount to \$1.60, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this . . day of August, 1955.

JOHN A. CHILDRESS,
Clerk.

EDWARD F. DREW,
Chief Deputy.

[Endorsed]: No. 14,852. United States Court of Appeals for the Ninth Circuit. C. A. Swanson & Sons Poultry Company, Appellant, vs. William A. Wylie, Trustee in Bankruptcy for the Manuel Delatorre dba R & M Egg Farms, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 6, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,852

C. A. SWANSON & SONS POULTRY CO., etc.

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for
MANUEL DELATORRE dba R & M EGG
FARMS, Bankrupt,

Appellee.

STATEMENT OF POINTS, AND DESIGNA-
TION OF RECORD ON APPEAL

Appellant hereby designates the points on which it intends to rely, as follows:

1. In order that a payment by a bankrupt should operate as a preference, it must be shown that the bankrupt was insolvent, that the creditor had reasonable cause to believe the payment was intended as a preference, and that a preference actually resulted.

2. The burden is on the party seeking to set aside the transfer to show that all these conditions existed at the time the transfer was made.

3. The evidence presented to the trial court was insufficient to warrant a finding that a preference was created in favor of the appellant, in that

(a) Appellant introduced direct testimony, which was uncontradicted, that it had no knowledge of bankrupt's insolvency at the time it received the money;

(b) That although checks were being returned by bankrupt's bank, appellant was informed by both the bankrupt and the bank that confusion had resulted because of the death of bankrupt's partner;

(c) That appellant testified to having checked with various credit agencies and with its competitors, and had been informed that the bankrupt had sufficient assets, but was pressed for cash by reason of having to use his cash to pay off the interest of his deceased partner;

(d) That under date of two months after the alleged preferences were made, Dun & Bradstreet issued to appellant a report showing that the bankrupt was solvent and has a net worth of some \$17,000.00; that at the time of trial the bankrupt testified that he had given this information to Dun & Bradstreet for the information of his creditors, and that it was his intention to withhold the information that he was insolvent.

(e) That appellee, trustee in bankruptcy, introduced no testimony at the trial showing a knowledge of insolvency on the part of the appellant, merely arguing that the returned checks were sufficient to put the appellant on notice that the bankrupt was insolvent at that time.

Appellant hereby designates the following to be included in the record on appeal:

1. Transcript of the proceedings at the trial.
2. Complaint.
3. Answer to C. A. Swanson & Sons, a corporation.
4. Statement of Issues.
5. Interrogatories.
6. Answer to interrogatories by plaintiff.
7. Request for admissions.
8. Reply to request for admissions.
9. All exhibits.
10. Findings of Fact and Conclusions of Law.
11. Judgment.
12. Notice of Motion for New Trial.
13. Order denying Motion for New Trial.
14. Notice of Appeal.

Dated: August 17, 1955.

/s/ NORMAN A. OBRAND,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 18, 1955.